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AMERICAN BAR ASSOCIATION
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Death of Senator Thomas J. Walsh

THE country as a whole, and the members of his own profession in particular, were inexpressibly shocked by the sudden and unexpected death of Senator Thomas J. Walsh on March 2. The circumstances under which he died made the sad event all the more tragic. He was to have been Attorney General in President Roosevelt's cabinet and no one doubted that he would be one of the outstanding members of that body of official administrators and advisers. He had recently been married to a Cuban lady, and they were on their way to the national capital when the end came.

Newspaper comments all over the country bore witness to the impress which the character and ability of the late Senator had made on the public mind. He was remembered by many chiefly as the relentless uncoverer of the great Teapot Dome scandal, but that was only one achievement in a long and useful career. Throughout his many years of service in the Senate he stood in the front rank as a debater, was known as a bitter foe of lobbyists, and exercised a great influence, both in committee and on the floor, on important legislation. His position in party politics is shown by the fact that he was twice chairman of the Democratic national convention—in 1924 and 1932.

The following biographical notes are taken from an article in the New York Times of March 3. The late Senator "was born at Two Rivers, Wis., on June 12, 1859, the son of Felix and Bridget Comer Walsh. His parents were natives of Ulster and Catholics, and the son was brought up in the same faith. After attending public schools, he became a school teacher when only sixteen years of age, and at twenty-three he was principal of the high school at Sturgeon Bay, Wis. While there he studied law, working towards his degree, which he obtained in 1884 from the University of Wisconsin.

"After practicing law for six years with his brother, Henry C. Walsh, at Redfield, S. D., he moved to Helena, Mont., where he made his home since 1890. In the Northwest there was a good deal of exploitation of labor by some of the large companies, and conditions were still wild and woolly in the early 'nineties.

"Mr. Walsh, through a sense of justice and regard for the workingman, incurred the displeasure of certain powerful groups and he was opposed with determination when he made his first bid for Congress in 1906. He lost, as he did when he presented himself for the Senate in 1910, but the people recognized him and he was elected without difficulty in 1913. This attitude against the encroachments of special privilege he kept throughout his career, and he was the terror of the lobbyists in Washington.

"In 1907 Senator Walsh founded the law firm of Walsh, Nolan & Scallon, which changed to Walsh, Scallon & Wine in 1925 and to Walsh & Scallon in 1929. He was a delegate to Democratic National Conventions seven times and became a leader of his party in Montana and neighboring States. For a number of years Senator Walsh was interested in sheep-raising companies, but this was the extent of his business activities.

"In the Senate Mr. Walsh advocated woman suffrage and the child-labor amendment. He led the fight to confirm Justice Brandeis for the Supreme Court. He handled the sections of the Clayton act exempting farm and labor organizations from the Sherman act.

"More than any other individual Senator Walsh was responsible for the enactment of legislation prohibiting the use of Federal funds in prose-

cuting trade unions under the Sherman act and providing for trial by jury for them in contempt cases growing out of Federal injunctions.

"When the Treaty of Versailles was still before the Senate Mr. Walsh advocated the entry of this country into the League of Nations, but he was never subservient in his adherence to the Wilson administration, as he demonstrated on several occasions."

Senator Walsh had been a member of the American Bar Association since 1906. President Clarence E. Martin and Secretary William P. MacCracken, Jr., attended the funeral services at Washington as representatives of the Association, and the former appointed the following committee to attend the funeral at Helena, Mont.: D. M. Kelly, Butte, Chairman; Warren Toole, Great Falls; Walter L. Pope, Missoula; A. J. Galen, Helena; M. S. Gunn, Helena; Judge R. E. McHugh, Philipsburg.

Politics and Receiverships

A STRONG criticism of the political and personal influences that obtain in the appointment of receivers by various Chancellors in Cook County, Illinois, is contained in the report of the Committee on Receiverships and Mortgage Foreclosures of the Chicago Bar Association. The report also sharply challenges the idea that the views of the Court as to the choice of a receiver should be all-controlling, and submits a very strong brief on this point. It says:

"Occasionally a judge sitting in chancery has expressed the idea that as the receiver is an officer of the court he should be selected by the court, and lawyers sometimes have acquiesced in this doctrine, the theory apparently being that the naming of the particular person who is to be the receiver is a privilege, or a duty, of the court,—a power which originally belonged to courts and was exercised by them, but which got out of their hands in some way; and that the chancellor of today who asserts his right to name receivers, without the suggestion, or over the objection, of counsel for parties in the case, is simply resuming a power that courts once had and exercised, and recovering ground lost by the courts at some time in the past. This is historically unfounded. The exercise of this power by the courts has never been regarded as good chancery practice except in individual cases where there were special circumstances calling for a departure from the general rule. A study of the cases, both in England and America (a memorandum of which accompanies this report) bears out this conclusion.

"No one, until recently, questioned the duty of the chancellor to give effect to the recommendations of the parties in interest, in the absence of special circumstances. A number of judges now sitting in chancery in the circuit and superior courts of Cook county, or who previously sat in chancery, told this committee that it used to be the uniform practice in the chancery courts to regard the wishes of the parties in selecting a receiver; and almost invariably the judges who appeared before the committee stated that this is and has always been their own practice as chancellors.

"The assertion made (though by only a few judges) of a claim that is contrary to the practice of courts of chancery and which amounts to taking property out of the hands of its owners and giving its management into the hands of a personal appointee of the judge professes to be based on the interests of the parties. It is significant, and very disquieting, to observe that the same judges who have asserted this claim also wash their hands of responsibility for excessive fees of solicitors and masters, on the theory that the parties to a suit can be relied on to protect their own interest. In other words, the judge awakens to his responsibility and insists upon a duty on his part to participate actively in the management of the suit, at the exact point where there is an important item of patronage to be exercised."

The report gives a brief statement as to the intrusion of political influences into the exercise of certain appointive functions of the Circuit and Superior Courts of Cook County, and adds: "The committee calls attention to this situation in order to emphasize the fact that when the large volume of foreclosure proceedings began early in 1930 the judges had become accustomed to the idea that patronage at their disposal might properly be distributed as their political sponsors suggested and in the circuit court political leaders had been able to formulate the administrative organization of the court.

"With the depression which began in 1930 and continuing through 1931 and 1932, the problem of satisfying the demands of party workers had become more and more acute. All the chancellors of both courts agreed that they have been beset upon all sides by applicants for appointment to receiverships and all expressed a desire to be relieved of this burden. In view of the scarcity of lucrative employment it would not be surprising to find that the power of the court to appoint receivers suggested itself to political leaders as a tempting opportunity for satisfying the demands made upon them, and that political influence had found its way into the conduct of foreclosure proceedings."

The natural result of political influence in this special field followed as a matter of course, according to the Committee's report. "Complaint has been made," it says, "that chancellors in making appointments have been guided rather by personal friendship and political associations than by a consideration for the efficient management of the real estate under foreclosure. That many such appointments have been made there can be no doubt. Their number is such as to reflect upon the judicial character of the court and tends to destroy confidence in its impartiality in the exercise of its other functions. An investigation made by the committee of more than two hundred receivers indicates that political considerations entered into the selection of many of them.

"It is urged by some that inasmuch as receivers are appointees of the court the chancellor is in duty bound to give preference to persons concerning whom he has personal knowledge and that since many of the chancellors have at some time during their lives been more or less active in politics it is to be expected that a much larger percentage of their acquaintances than would otherwise be are likely to be engaged in some form of political activity. But such appointees appear in so many instances to be lacking in the necessary qualifications for the management of receiverships entrusted

to them as to lead the committee to the conclusion that a plausible reason has been advanced to conceal a bad practice."

The Committee, while admitting that the practice of acting upon the recommendation of parties to the litigation sometimes results in bad appointments and abuses, maintains that "with care these undesirable features can be reduced to a minimum and that the chance of their developing to such an extent as to constitute a reflection upon the court and the conduct of foreclosure proceedings is remote." It therefore recommends that in unopposed motions for a receiver's appointment, the recommendation of the complainant and his solicitor be followed, unless the court finds the nominee unqualified, in which case the complainant and his solicitor should be given an opportunity to make other suggestions; that where the parties agree upon a particular receiver, the court should accept this agreement, subject to the same exception; that in cases of contest, the court should, subject to the foregoing exceptions, follow the suggestion of complainant, on the absence of bona fide objection by some other party in interest; and that in all cases the complainant or other party in interest should have a substantial interest in order to entitle him to make suggestions upon which the court should rely.

The committee recognizes that there are judges in Cook County who have followed the true Chancery practice and to whom the above criticisms do not apply.

The Press and the Massie-Fortescue Trial

THE JOURNAL has been requested by President Martin to publish the following communication:

Chicago, February 15th, 1933.

Hon. Clarence E. Martin,
President, American Bar Association,
Martinsburg, West Virginia.

Dear Sir:

With regard to the "report of the Committee on Cooperation between the Press and the Bar" submitted to the last annual meeting of the Conference of Bar Association Delegates, the committee has been informed that the paragraph referring to the Massie-Fortescue trial has caused some displeasure among members of the bar in Honolulu, who seem to have construed it as a criticism of the presiding judge.

It is rather difficult to see what there is in the report upon which any complaint can be based. It seems rather obvious, to those who would read it as printed, that it is a comment on the unwarranted liberties taken by the representatives of the newspapers in reporting the trial.

The comment was necessarily derived from newspaper reports by the members of our committee who observed them. None of the committee was in Honolulu or knew of the precautions taken by the presiding judge to prevent exploitation, which we since learn were carefully planned and imposed, but were circumvented. The committee disclaims any implication of reproach toward the presiding judge, or intentional cause of displeasure to his friends at the bar in Honolulu.

Very respectfully,

ANDREW R. SHERRIFF,
Chairman.

Arrangements for the Fifty-Sixth Annual Meeting

Grand Rapids, Michigan, August 30, 31 and September 1

Section Meetings, Monday and Tuesday, August 28 and 29.

General Sessions, Wednesday, Thursday and Friday, August 30, 31 and September 1.

Annual Dinner Friday evening, September 1.

HEADQUARTERS: Pantlind Hotel.

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Morton Hotel	2.50– 4.00	4.00– 5.50	5.00– 7.00	
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*Suites of two bed rooms with communicating bath, for two or more persons, from $5.00 to $14.00. Rooms with running water but without bath, $2.50 single, $4.00 double. Kitchenette apartments may be secured upon request.

Explanation of Type of Rooms

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A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

National Conference of Commissioners on Uniform State Laws

The next Annual Meeting of the Conference will be held at the Hotel Pantlind, Grand Rapids, Michigan, beginning Tuesday, August 22, 1933. Applications for hotel reservations should be made to the Executive Secretary of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois.

SOCIAL PLANNING AND PERSPECTIVE THROUGH LAW

Law Is Inseparably Interwoven with the Economic, Political and Social Elements of Our Institutions and It Is a Primary Function of Law-Making Agencies to Coordinate These Forces through Law into Dynamic and Constructive Social Programs — World Crisis Preeminently a Challenge to the Legal Profession—Changing Conception of Law and the Social Sciences*

By Albert J. Harno
President of Association of American Law Schools, 1932

MY first concern this morning is to comment on the title of my paper. My impressions of it, on re-reading what I had written, perhaps can best be told by relating an anecdote from the life and activities of P. T. Barnum. Barnum, ever alert to catch the fancy of people and to entice away their small change, once advertised as a side-attraction to the main show a cherry-colored cat. The scheme worked and many paid the admission fee to see this unusual animal. What they saw, however, was no more than a sleepy black cat of the house-pet variety reposing in a crib. Explanations were sought and were forthcoming. "Surely you must know," a serious-faced attendant informed them, "that some cherries are black." My title, I suspect, is no more unusual than Barnum's cat.

Of course I shall discuss a phase of the social and economic debacle, for I do not know of a subject which is more appropriate. The distress of the day is giving rise to various proposals bearing on a planned society. Undiscerning persons are terming these proposals as "economic planning." They do not appear to realize that if any social planning is to be made effective, it must be through the regulation of law; that the burden of the demand for planning is, in fact, for more governmental control. Social planning is not a new idea, except to some who have just discovered it. To plan social programs has been and is the peculiar responsibility of law-making agencies. In fact, legislators, if they are to do more than bury their heads in timeless sand, must look toward and provide for the future, and judges are no less legislators than those who bear the name. The world moves on, the eternal flux of life is about us, and plan we must. The problem is, will we make this planning intelligent, or must it remain haphazard? For these reasons, though the present world crisis is challenging our whole social heritage, it is preeminently a challenge to the legal profession.

How are we to meet this challenge? The difficulties appear almost insuperable. In the future men may be able to analyze the disasters which we have experienced in a dispassionate and unemotional way; they may be able to unravel causes and to discover the remedies. But for us the problem is not so simple. We are too close to a rapid succession of stupendous events; our judgments are too filled with fogs of our own creation. Then, too, the catastrophes which we have encountered, both individually and collectively, have confused and dumbfounded us; yet herein lies an element of hope. We are likely to come through this period chastened and humble, for we have beheld ourselves in a new and unflattering role—that of insignificant and dejected creatures unable to stem the onrush of suicidal forces, powerless to control the frankensteins of our invention. And with this chastening, there has come a new desire for change. Who among us today regards the social framework handed down to us as the infallible instrument of a manifest destiny? Under stress, our leaders have been unable to operate our institutions. Even the average man knows this, for he has seen political leaders crumple beneath responsibility, and the masterminds of business crash in failure. Never has the public been more receptive to new ideas, and more susceptible to nostrums. Now one scheme has its attention and then another. At the moment it is curiously examining the meaning of a trick word; "Technocracy" has the country agog.

What the social order of a generation or even a decade from now will be—or ought to be—one cannot foretell. To construct the outlines of the future is difficult enough in what may be called "normal times." Today prediction would be futile. For threads of continuity are broken; there are no well-defined trends, and the social momentum is being dissipated. What direction society will take when its course once more becomes discernible is yet unknown. But this we do know: before a new course is shaped, men will probe deeply into the foundations of our economic and social structures. All our old assumptions will be tested in the clear, cold light of modern knowledge and contemporary experience. In this process, so-called "fundamental principles" may undergo material changes, and we may find that liberty which is *political* only is no liberty at all, and that *economic* liberty is vastly more important. And I doubt not when the conditions which have brought on our distress are diagnosed, we will find the law, both in what it has done and in what it has failed to do, prominent among the contributing factors. What law-making agencies have not adequately perceived is that law is inseparably interwoven with the economic, political, and social elements of our institutions; and that it is a primary function of these agencies to co-ordinate

*This address was delivered by President Harno at the annual meeting of the Association of American Law Schools held in Chicago in December, 1932.

these forces through law into dynamic and constructive social programs.

Older Conceptions of Law

This interrelation has long been obscured. It has not been understood that law is a coordinating agency; that it does not function in an infiltration-proof department; that no interest can be labelled distinctly "legal," "social," "economic," or "political." The explanation of all this is historical. Law was the first of the social sciences, and that may account for its aloofness even today. Before economics, political science, and sociology as such made their appearance, judges and legislators found themselves compelled to give expression to regulatory statements under which human beings might live together. In the beginning knowledge of social principles was limited and was associated with law. Advancement came haltingly. First the law recognized economic needs; then followed pronouncements on life, health, and the protection of the state and the established order. Thought was primitive and only obvious matters were considered. But as the social order became more complicated, the legal conception of its problems became more comprehensive.[1]

Advancement toward an understanding of the place and function of law in the social organization also was impeded by early conceptions of the origin and content of law. Here again we find law differing from the other social sciences, for being of an older generation, it fell under the influence of the thought and habits of that generation, and to this day it clings to many old-fashioned ideas and insists on wearing some of the garments peculiar to that period. The conception of law we see emerging from the essentially scholastic thought of the Middle Ages is that of natural law, immutable and preordained.[2] Sterile ground, indeed, was this for the germination of a philosophy which conceives law to be a useful social device which changes with and adapts itself to the varying needs of society.

In time the belief in natural law waned and gave way to the conception that the content of law lay entombed in history. There it was like a buried city of a dead civilization. To find it one had to explore and to dig for it. The function of the lawyer and the judge was to excavate and reconstruct but not to build new edifices. Still another school of thought perceived of law as an independent science—a self-contained system which "ignored every other department of knowledge as irrelevant to its problems and of no value to its ends."

These factors, the clinging to old ideas and procedures which were "handed on like current coin without being looked at or examined," and the sterile and lifeless legal philosophies of the past, placed a heavy restraint on the uses to which law could be employed. Today we observe a marked change, for a new philosophy is supplanting the old. The emphasis now is more on the ends of law and less on its beginnings. We care less about the sources from which it is derived and more about how it operates. "Pedigree is yielding to performance," and progressive thinkers are concerning themselves with the means through which the law may be rid of fictions and anachronisms, and how it may be shaped to operate as a modern device for social regulation.

Changing Conception of Law and the Social Sciences

This conception of the place and function of the law has come about largely through contact with the thought and methods of the social scientists. Though their contributions have been available to lawyers for some time, only recently has it been emphasized that there exists between law and the social sciences a close relationship; that while each treats of a different phase of social conditions, the subject matter of social science is identical with that of the law or is closely connected or interacts with it. If this be true, the desirability, in fact, the necessity for the law to keep in close contact with the thought and work of the social sciences becomes apparent. In principle, this view finds ready support. The difficulty lies in establishing and maintaining it in practice. Theories bearing on social conditions and problems have in the past century grown and changed rapidly. Thus the principle of competition formerly developed so assiduously has given way to that of cooperation; the doctrine of *laissez faire* to that of regulation; and the theories of retribution and deterrence in criminal punishment to those of segregation and rehabilitation. Lombroso's hypothesis of the born criminal at one time attracted a following among criminologists, but was quickly dropped when disproved by the studies of Goring and others.

Legal thought moves more slowly; legal theories are written into constitutions and statutes, or through judicial pronouncements take the form of binding precedents. In consequence, desirable changes come slowly even when social pressure is great. City planning and zoning measures are impeded by constitutional enactments; income tax legislation and programs for procedural reforms, civil and criminal, are met with similar obstacles, and the current of judicial decisions is restrained by the powerful influence of the doctrine of *stare decisis*.

The law has been so conceived that its substance—constitutions, statutes and judicial decisions—tends to insulate it from worldly affairs. The fourteenth amendment is protective but also obstructive; likewise the eighteenth which now appears to be blocking the fulfilment of an overwhelming social desire. With concern for the social welfare, the constitution guaranteed trial by jury and the privilege against self-incrimination and forthwith shut the door and turned the key against the further expression of the social will. The celebrated *McNaghten* case, decided in 1843, laid down the test governing insanity defenses and so closed rapprochement with the advances in science. There is an air of paternalism about the law but also an aloofness, and its pronouncements are well-nigh inexorable.

This description of the law, of course, is somewhat impressionistic; it is not wholly accurate and fair in details. Judicial opinions have often evinced a remarkable effort to weigh the demands of social policy, and in dealing with vital questions they have become increasingly absorbed with the "legal bases of the economic and social system."[3] This is true,

1. See Wurzel, *Judicial Thinking, Essays on Science of Legal Method* (1921) 286; Vinogradoff, *Collected Legal Papers* (1928) 358.
2. See Pound, *Interpretations of Legal History* (1923).
3. See 1 Ency. of Soc. Sc. (1931) 220.

but the *noli me tangere* attitude, nevertheless, remains a marked characteristic of the legal system, and liberal opinions based on social and economic data have but increased the incentive for a better approach to such materials. If the law truly is to be dynamic, we must seek to devise means through which it may more readily assimilate new truths, and we must aim to give scope and flexibility to the interaction between law and social or economic facts.

Contributions Available Through Scientific Agencies

Then, too, the older sciences—those which we sometimes describe as "physical"—have their contributions to make to this new synthesis of social regulation. Strangely enough it was among the physical scientists that the revolutionizing idea became current that all laws are mutable and relative. Reference has been made to the legal test governing insanity defenses. Medical science has long complained that it has been shunted on this question. Its position cannot continue to be ignored if this problem is to be dealt with intelligently and expertly, and psychiatry, the youthful offshoot of medicine, is pressing vigorously its claims and capabilities. It even goes further and is telling the law that its postulates governing criminal punishment smack of the Middle Ages and, as viewed in the light of modern science, are wrong. Indeed, the claim is made that the whole superstructure of the criminal law is built on false premises. Psychology, too, has made important contributions, and it is not inconceivable that the progression of thought may be from a conception of law as a system of rules divinely given to studies analytical and historical, in the past; to the functional and sociological view, involving how man reacts to social forces, in the present; to an individualized study of why he acts, in the future.

Legal medicine, in still another of its service offerings, has received scant recognition. Both civil and criminal investigations frequently require the aid of pure and applied science as well as that of the medical sciences. Often when a crime has been committed or an accident has occurred, investigation by experts is necessary to the end that intelligent and efficient use may be made of evidential facts. This work can be performed well only by persons who have had special training. The task may call for pathologists, toxicologists, microscopists, chemists, immunologists, bacteriologists, or other specialists. An agency which should make use of these sciences is the office of the coroner. The coroner's duties are both magisterial and medical. Each of these requires a high degree of specialized knowledge, and each notoriously is ill-performed. The scientific specialist could render services of inestimable value in criminal investigations and in various civil controversies, if our legal system would make a place for him. It is now using him quite inadequately.

In many European countries scientific specialties have been marshalled into organizations known as medico-legal institutes and have become efficient organizations serving the needs of justice. "The facts and methods of scientific medicine," according to Dr. Schultz,[4] "which form the basis of the work of foreign medico-legal institutes, are as well developed in this country as they are abroad. Our backward state consists, not in the lack of the necessary scientific knowledge, but in the failure so to organize that knowledge as to make it fully useful in the administration of justice."

Law as a Coordinating Agency

Social planning through law is not a new doctrine. The whole structure of constitutional law represents a program of planning. Likewise various statutes—tax legislation, zoning statutes, public utility regulations, criminal codes—all are attempts at planning. What has been lacking is an appreciation of the potentialities of law as a planning device. The National Economic League recently has selected by a poll of its council what it has designated the "Paramount Problems of the Present Economic Depression." Thirty-nine titles were listed, and all of them, if they are to receive effective consideration, require planning through law. Of those mentioned economy and efficiency in government—national, state and city—were given first place and taxation second. Some of the others listed were banks, banking credit and finance; tariffs; administration of justice; economic planning; railroads and transportation; over-speculation; coordination of production and purchasing power; money, the gold standard and silver; federal reserve policy; and anti-trust laws.

The League calls them problems of the *economic* depression. What seems not to be understood is that no problems are solely "economic." Social, economic, and legal elements are constantly interwoven. The background of social and economic interests is law, but the content of a legal interest is social and economic.[5] The law is now the warp of the social fabric and again the woof. Consider some of the problems selected by the League—economy and efficiency in government, taxation, banks and banking—all relate to the economic order, but all are created and protected by law, and no change can be wrought in any of them without resort to law. The problem is one of coordination. We have the parts, but they are of no use unless assembled into a working machine. We have not recognized sufficiently that economic policies need the aid of law; that the theories of criminologists and psychiatrists are of little value unless sanctioned by law; that law, in turn, if it is to do more than to rattle dead bones, if it is to become a vital, useful, social fact, must assimilate new truths and new thought; that law, since it is society's agency of authority, must interrelate the knowledge of the specialties into a thoroughly wrought and operating device for social service. This, in the new order, is the challenge given to the law.

Place and Function of the Judiciary

The significance to the social welfare of such a program has not gone unobserved. Once attention was taken from "universals and absolutes" and from historiology and analytics and turned toward human affairs, the assimilation into law of facts from life became possible. The trend has been unmistakable; our impatience is with the slowness of the movement. The law lags. It must do more than crawl in the wake of business enterprise and

4. *Possibilities and Need for Development of Legal Medicine in the United States* (1932) Bul. 87, National Research Council, 110.

5. See Bonbright, *The Problems of Judicial Valuation* (1927) 27 Colum. L. Rev. 405.

social change. It must become dynamic. Liberal thinkers realize that, but when thought turns to action, the restraints of the systems in which they work hold them back. Nowhere has this been more apparent than with members of the judiciary.

The forces which impel a judgment in the judicial process are a curious mingling of elements involving traits of mind and of temperament, educational and environmental background, "traditional beliefs, acquired convictions, an outlook on life, a conception of social end." These forces find varying reactions in different individual judges and so we have what we call conservative and liberal members of the court, leanings toward individualism in some and toward group welfare in others. "The world of absolute and fixed categories and the mechanistic conception of the universe still linger in common sense." A distrust of the powers of formal logic has marked the trend of judicial thought during the development of the new conception of growth and of experimentation. The judicial process ultimately involves an application of the general to the particular. The judge "fashions the law for the litigants before him," but in "fashioning it for them he will be fashioning it for others." The immediate bearing of a decision is upon the issues in the particular case. Its influence, however, frequently does not end there, but continues to bear on the course of law administration for years, for generations and even for centuries to come.[6]

The judiciary, indeed, wields a profound influence, whether exerted consciously or not, in shaping the course of economic and social development. A particular decision, at the moment, may seem insignificant, but it may involve serious repercussions on the price system.[7] In 1903 the Supreme Court in *Blackstone* v. *Miller*[8] upheld the power of the state to tax bank deposits at the place where the bank was located. Shortly afterwards thirty states took steps to impose such a tax,[9] but these acts were in turn nullified by another decision[10] of the Court which overruled *Blackstone* v. *Miller*. Criminal investigations have been materially affected through a holding that unlawful searches and seizures violated the constitution.[11] In the case of *Smyth* v. *Ames*[12] the Supreme Court took a position which seriously affected all legislative programs for public utility regulation, and in *Holden* v. *Hardy*[13] it gave clear indication that henceforth it would "require the state to show special justification in support of measures restrictive of the right of employers to make such terms as their economic advantage enabled them to in dealing with employes and those seeking employment." Through these decisions the Court virtually became a "third house in every legislature in the country."[14]

To marshal a list of "history making" decisions would not be difficult, but that is not the purpose of this discussion. From cases let us turn our attention for a moment to individuals. If we are to gain an insight into the judicial process we must engage in a study of men. For, as has been observed, the judge's training, his personality, his temperament, his courage, the spectacles through which he views life determine his decision. "In the hands of Marshall and Story, Taney, and Field," the constitution "produced widely variant results."[15] The decision in *Marbury* v. *Madison*,[16] in the words of Beveridge, "was a great event in American history," but in saying that he was writing the biography of a man. That case established the supremacy of written constitutions over legislative acts. Beveridge in his comments continues: "This principle is wholly and exclusively American. It is America's original contribution to the science of law. The assertion of it . . . was the deed of a great man. One of narrower vision and smaller courage never would have done what Marshall did. In his management and decision of this case, at the time and under the circumstances, Marshall's acts and words were those of a statesman of the first rank."[17]

In recent times the deft touch of Mr. Justice Holmes has revolutionized legal thinking. Holmes, the many-sided man—Holmes the historian, the philosopher, the pragmatist—led us to the discovery that "judges are not the mere automata of established rules of law, but are law-makers, whether they would be or not, and so must accept responsibility for the kind of law they make."[18] And still more recently Mr. Justice Brandeis has given us a new legal technique. "He has been the first to face squarely and consistently the problems of the relation between social change and judicial action."[19]

It is an evident fact that there is movement and direction in judge-made law; that as case follows case, the difference from one to the other may not be great, but the holdings at the "beginning and at the end may lie far apart"; and that great judges by means of great decisions have given marked impetus and guidance to changing conditions. But it is also true that each decision, restricted as it is by the facts and issues of the case, works in a narrow compass; that it lacks sweep and comprehensiveness. "The weight of precedent, the fortuitous appearance of cases, the bondage of judicial technique to litigations, the unorderly and almost leaderless army of judges, arrest and confuse the work of restatement."[20] On the great canvas which depicts our affairs, the judge adds a stroke of the brush here and a touch of color there, but he does not give form and symmetry to the painting.

Mr. Justice Holmes has stated with characteristic directness the limitations under which the judge works, in an opinion written in 1900 while he was on the Supreme Court of Massachusetts.[21] "But the improvements made by the courts," he said, "are made, almost invariably, by very slow degrees and by very slow steps. Their general duty is not to change but to work the principles already sanctioned by the practice of the past. No one supposes that a judge is at liberty to decide with sole

6. See Cardozo, *The Nature of the Judicial Process* (1922) 21-22. And see Hamilton, *Judicial Process* (1932) 8 Ency. of Soc. Sci. 450-456.
7. See Bonbright, *The Problem of Judicial Valuation* (1927) 27 Colum. L. Rev. 493.
8. (1903) 188 U. S. 189, 23 Sup. Ct. 277.
9. See *Taxation of Intangible Property* (1930) 16 Corn. L. Quart. 457.
10. (1930) *Farmer's Loan and Trust Co.* v. *Minnesota* (1930) 280 U. S. 204, 50 Sup. Ct. 98.
11. *Boyd* v. *U. S.* (1885) 116 U. S. 616, 6 Sup. Ct. 524; *Weeks* v. *U. S.* (1914) 232 U. S. 383, 34 Sup. Ct. 341; *Silverthorne* v. *U. S.* (1920) 251 U. S. 385, 40 Sup. Ct. 182.
12. (1897) 169 U.S. 466.
13. (1897) 169 U. S. 366.
14. Corwin, *Social Planning under the Constitution* (1932) 26 Am. Pol. Sc. Rev. 1, 12.
15. See Lerner, *The Social Thoughts of Mr. Justice Brandeis* (1931) 41 Yale L. J. 1, 12.
16. 1 Cranch 137.
17. 3 *Life of John Marshall* (1919) 142-143. But cf. comments on Marshall's work, Boudin, *Government by Judiciary* (1932).
18. Corwin, *op. cit.*, 16.
19. Lerner, *op. cit.*, 12.
20. Hamilton, *op. cit.*
21. *Stack* v. *New York*, etc., *R. R.* (1900) 177 Mass. 155, 158; 58 N. E. 686.

reference even to his strongest convictions of policy and right. His duty in general is to develop the principles which he finds, with such consistency as he may be able to attain." In 1917 he reemphasized this view, this time while writing as a Justice of the Supreme Court of the United States.[22] "I recognize without hesitation," he said on this occasion, "that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say, I think well of the common-law rules of master and servant and propose to introduce them here *en bloc*."

The judiciary, it is clear, operates within a narrow compass and through unconnected acts. Unquestionably, judges legislate, and, as they consider the effects of their decisions, they plan, but the nature of the judicial process is such that it cannot give comprehensive guidance to the flow and change of conditions.

The Legislatures

It is but natural, as men have struggled with the problems inherent in judge-made law, that they have turned with hope to the potentialities which lie in legislation. Recently Professor Sunderland, in a masterly address before this Association, stressed the advantages of that process. "The public," he said, "has become thoroughly disillusioned as to the inherent evolutionary power of the law. Legislation," he stated, "is the order of the day" and "codification will doubtless follow. Will the profession," he inquired, "lead or will the leadership pass to the laymen?"[23] "Statutes," another writer has said, "are the only conceivable remedy" to untangle the "skein" made by the courts,[24] and another tells us that "legislation tends with advancing civilization to become the exclusive source of new law."[25]

The legislator truly is in a fortunate position to assimilate into law the discoveries of the various social agencies. He is not restricted to particulars as is the judge. He can plan broadly; view social questions in perspective; incorporate new truths into law; discard outworn and discredited ones; protect social interests; guide and direct them; make them dynamic through the sanction of law; coordinate social and scientific factors; and give scope and comprehensiveness to the structure he builds. He works within limitations, but more than to any other human agent, power is given to him "to grasp this sorry scheme of things entire," to "shatter it to bits," and then "to remold it nearer to the heart's desire."

Most, if not all, the paramount problems of the day lie within his domain. He has the center of the stage in a great social drama. Economy and efficiency in government, taxation, banks and bank reorganizations, tariffs, railroads and transportation, farm relief, unemployment, child welfare, penology and prison reforms, coordination of production and purchasing power, city zoning, anti-trust laws, consolidations and mergers—all these may, indeed they must, pass through his hands. Society is in the making; it has always been and will ever be so. Whether its affairs will be molded by skilled or unskilled hands depends on the functioning of a variety of agencies but on none is the responsibility greater than the legislator. What the future framework of our society will be rests largely with him—on his acceptance of his responsibilities, his insight into problems, his perspective, his capacity to deal with intricate tasks and his mastery of his art.

Yet what are the facts? How do our legislatures perform? Consider them the country over, do they measure up to their responsibilities? Are we justified in placing our trust in them to fashion policies which will raise us out of distressing conditions and which will adjust and coordinate political, economic, and social factors into working and useful devices? Or are the defects in our legislative system such that we must initiate, if improvement is to be had, a different or supplementary agency—one that can in fact plan for us and give us leadership?

The truth is that the typical legislator is an amateur at law making. His primary interest is a private business or profession; legislation with him, at best, is an avocation. In one of our populous states the legislature meets approximately five and one-half months in each two year period. The balance of the time the individual legislator works at some gainful occupation and even while the legislature is in session he gives only a portion of his time to his official work. Now, it is unlikely that a legislator, though he devoted all his time to legislation, could become an expert on all the problems which come before a single session of the legislature of a populous state, and much less can one who devotes the major portion of his attention to private affairs. And furthermore, the typical legislator is likely to approach his task with a lack of appreciation of the responsibilities involved, and with a background and training insufficient to enable him readily to master or even understand the problems before him.

In referring to the process of legislation in one of our states—a typical one—a writer has described it as "haphazard and purposeless." No legislative program is worked out in advance to be submitted to the session. With no real policy or program of its own, the legislature is besieged by lobbies and special interests pressing claims for or against pieces of proposed legislation. Under the circumstances much can be said for lobbies, for without them the sessions would be drab performances indeed. It is, however, quite unlikely to secure balanced and comprehensive programs through such sources. Rather the result is that legislation is "more clearly determined by the preponderance of forces brought to bear upon legislative bodies than reasoned activity of the members." Seldom are issues settled on the basis of social desirability; more often on "expediency" and "compromise." The ends of the sessions are marked by a rushing and crowding of work; "undue haste is essential if the measures are to get through before adjournment."[26] The whole arrangement is so desultory and dis-

22. *Southern Pacific Co. v. Jensen* (1917) 244 U. S. 205, 221.
23. *The Law Schools and the Legal Profession* (1930) Proc. Assn. Am. L. Schools, 29, 40.
24. McBain, "Law and Government" in *Whither Mankind* (1928) 142, 152.
25. Holland, *Jurisprudence*, 71, quoted by Sunderland, *op. cit.* 37.
26. See Dodd, *Government in Illinois* (1923) 141-159.

heartening that it is held in disrespect by many. It is so much so in fact that one observer has said, "that the breakdown of legislative efficiency is one of the marked political phenomena of our time."[27]

Auxiliary Agencies

Other agencies have been organized and are in operation. Can they give the leadership we desire? Traditionally the powers of our government are distributed among three distinct departments. Complete separation, however, was not achieved even at the beginning, nor has it been possible to maintain the policy of separation in its "pure" form. The growing complexity and burden of government have necessitated the creation of various auxiliary bodies. At an early time, the President was given various department heads to assist him, and these as a collective group act as his cabinet. The cabinet, as such, however, has no legal existence. With the expansion of regulative legislation during the last century, there has grown up a body of administrative law which is operated "through commissions vested with powers to issue orders." The tendency in recent times seems to be "toward legislative regulation of economic activity." "It is doubtful," according to Professor Freund, "whether at present any machinery can be devised more effective for the protection of private interests than the combination of adequately safe-guarded administrative procedure and of judicial review, such as results from the recent legislation of Congress."[28]

Another movement of promise has involved the appointment in various states of judicial councils. What such bodies can accomplish with "adequate powers and with a personnel which recognizes its responsibility is indicated by the history of the California body." The California Council has studied "the disorganization and maladministration of the courts" of that state; it has secured data showing causes of trouble, and in the exercise of its administrative powers it has redistributed the work of the courts, shifted judges to where they were most needed, and has proposed legislation "to correct defects in the law." Still another promising development has been the resort, now by one department of the government and again by another, to the aid of commissions. Of these, the various state commissions on uniform state laws merit mention. These groups, working within their respective states, but affiliated with and constituting the personnel of the National Conference of Commissioners on Uniform State Laws, have been able to render splendid service. In particular, their work is unexcelled in coordinating various social and economic factors into useful proposals for legislation. All of these organizations are helpful, but in all cases their assignments are limited.

A Scheme of Comprehensive Planning

To propose some new agency, when so many and such a variety of old ones are already in action, would seem to be a work of supererogation. Yet I do not believe it to be such. It is true we have an abundance of agencies. But if the thesis I have advanced is sound, it would appear, because of one limitation or another, that no one of them is in a position to give direction and comprehensiveness to the program which our changing conditions demand. Hence, it would seem a paramount need of our time to establish an institution which will perform this service. Our review of existing legal agencies has shown that the legislature is the most promising one for the undertaking. It alone, of those mentioned, can plan a program along broad and comprehensive lines; it can anticipate problems and so smooth the path for economic enterprise; it need not withhold its hand until issues are presented; it can experiment—make and unmake; it can assimilate the various forces—scientific, economic, political and social—which touch our lives, and fit and coordinate them into a working device. Potentially it can do all these, but so far its performance has been disappointing. Potentially it is the greatest single factor in our scheme of life for fashioning and directing the affairs of men into channels of progress and well-being; yet in achievement its work has been patchwork and trifles. And this has been so because it has lacked adequate personnel, leadership, and a conception of its capacities and responsibilities.

Yet this is the body which in our scheme occupies the most strategic position to give relief. Out of the distressing conditions of the day have come various proposals calling for "economic" planning. *Economic?* The stress is misplaced. No interest, as we have seen, is purely such. If constructive planning is to be done it must be through law, unless, indeed, it comes as a result of upheaval and revolution. Only through the processes of law are we able adequately to coordinate the various phases of life into a system which speaks with authority. Various interests—scientific, social, economic, and legal—combine in planning a comprehensive program; the mission of the law is to adjust and to sanction. The President recently has urged action looking toward the immediate reorganization of our banking system. The recommendation was to Congress to pass legislation. He emphasized the need for action bearing on transportation and power regulation, on anti-trust laws, extension of aid to child health services, membership in the world court, revision in the bankruptcy laws, and in federal court procedure. He was calling for legislation. He said that there were three great fields of international action—world peace, world disarmament and organized world recovery—"which must be considered not in part but as a whole." He was speaking to Congress.[29] In every part of the country men are congregating to discuss issues, to plan, and to construct programs. To what end? To submit their proposals to Congress or to a state legislature. Agriculture has long been a sufferer. Its leaders have drawn up a program of relief and are submitting it to Congress. Methods of taxation have broken down and new ones are being proposed—proposed to Congress and to the various state legislatures. It is befitting that interested groups act as legislative aids. But can it be that our legislative bodies are conceived to function only as passive agencies? Legislation secured through interested groups has produced the curse of a multiplicity of laws, and the effect has been a patch-work and an unbalanced system. It has been characterized by a want of order, design and com-

(*Continued on page* 250)

27. Wigmore, *A Program for Legislative Efficiency* (1929) 24 Ill. L. Rev. 215.
28. *The Growth of Administrative Law* (1923) 25. See also Freund, *Administrative Law* (1931) 1 Ency. of Soc. Sc. 452-455.

WORK OF THE UNITED STATES BOARD OF TAX APPEALS

Procedure Confronting Taxpayer before Creation of Present Tribunal—Diversion of Pressure in Tax Cases from the United States District Courts — Opportunity Afforded for Settlement of Disputed Liabilities Before Payment—Saving to Government in Interest Payments on Taxes Erroneously Collected—Actions Expedited—Statistics as to Legal Calibre of Board's Decisions

By George Maurice Morris
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LEGISLATORS cry out "Tax. Tax. What can we tax?" Complaints against taxing systems and tax administration are features of public and private utterances. The phrase "taxpayers' strike" has become almost a single word. In this season of complaint there may be some interest in an agency in tax administration which has afforded refreshing satisfaction to many persons.

If the United States Board of Tax Appeals had not existed the last eight years, its creation would have been necessary. Without this Board it is believed that the United States District Courts would have been submerged beneath the flood of tax litigation which has arisen in the last decade. The expenditure of millions by the Government in the administration of the Federal taxing system has been avoided by the Board of Tax Appeals. Perhaps of greatest importance, this Board, by affording an opportunity for the settlement of disputed liabilities before payment is forced, has prevented something approaching revolt by those taxpayers who are now sought to be charged further on their income for the air castellated days culminating in 1929.

Before the creation of the Board of Tax Appeals in 1924 the procedure in the collection of Federal income, profit and estate taxes compelled the taxpayer, seeking a judicial determination of his disputes with the Commissioner of Internal Revenue, to pay his tax first and sue for its recovery in the District Courts or the Court of Claims. Financial ruin came to some taxpayers through this harsh rule.

To avoid the frequently severe consequences of the Commissioner's last word, organizations, within his office, were set up to discuss settlements before assessment. The procedure before these groups was not satisfactory. Few of their decisions were published. The informality of procedure led many taxpayers to fear that they were not getting the same favorable treatment accorded other taxpayers. There was present in the mind of the disputing taxpayer the feeling that the conferees were the creatures of an officer whose chief desire was to get as great a tax as could lawfully be forced. Constantly in the background was the knowledge that the Bureau could always say "no," levy an assessment and compel almost immediate payment. The pleas of the taxpayer required too much a flavor of favor-asking rather than right-insisting. Due to the absence of published precedent the man on the Bureau's side of the table was frequently weak in decision for fear of criticism from his superiors, his successors or some Congressional Committee. There was an atmosphere of uncertainty—of "fumbling"—which left nearly everyone concerned unsatisfied. Some of these things the sponsors of the Board of Tax Appeals felt would be ended and all of them ameliorated. In the main, the faith of the sponsors has been justified.

Prior to the creation of the Board, it was to the United States District Courts that most taxpayers went to recover their disputed taxes. These courts from July 1, 1924, to June 30, 1932, have disposed of 24,040 cases involving internal revenue matters.[1] During the same period there were filed with the Board of Tax Appeals, 66,788 petitions involving income, profits and estate taxes.[2] Of course, all of the appeals filed with the Board might not have resulted in suits in the District Courts if these taxes had been paid but it would seem reasonable to suppose that a large majority of them would have reached those courts. If that be true, little imagination is required to picture the calendar situation in the District Courts if a majority of the 66,000 Board proceedings had been added to those actually docketed there.

If the method of settling tax disputes in existence prior to the creation of the Board of Tax Appeals in 1924 had continued, the consideration by the District Courts of their normal business would have been immeasurably delayed. Without the Board relief from the congestion would have come only through the creation of new district courts, added judges, clerks, personnel, quarters, and so forth.

In place of either the creeping progress of already harassed judges or the imperfect decisions of a flock of newcomers to the business, we have the output of the sixteen members of the Board of Tax Appeals. Most appointments have been of men with experience in the tax field. New members have received the benefit of consultation in the sessions with the other Board members, which has proved good filter against clear blunders. District judges work alone; members of the Board of Tax Appeals work in concert, even though not always in tune. Greater certainty in their field has given

1. These figures are taken from the annual reports of the Attorney General. Only a portion (the extent of which is unascertainable from the reports) related to income, profits and estate taxes.
2. The Board disposed of 49,056 of these cases.

the personnel of the Board an independence from the views of the Commissioner of Internal Revenue which has been admirable. The Board's formal decisions and supporting opinions are all published (as opposed to the suppression of opinions in the old days) and all are available for public inspection.

There is the lower expense item to consider also. During the eight years of its existence the average annual expenses of the Board have been a bit under $575,000.[3] For a body which has entered decisions in this period for $332,946,923.45, this is not a large expense—one and one-tenth cents per dollar of deficiency. It would seem that these costs would compare favorably with what might have been those of sixteen, or more, new judges and their staffs.

If the Government were paying interest on money which would have been collected by what have proved to be the erroneous determinations of the Commissioner of Internal Revenue, such interest would dwarf the expenditures for the operation of the Board. In eight years aggregate deficiencies of approximately $1,195,000,000 proposed by the Commissioner have been reduced by the Board of Tax Appeals to less than $381,000,000.[4] This would indicate that if payment were made first and refund later, the Government would have erroneously collected at least $800,000,000 more than it had already collected. The interest on this amount, at 6 per centum annually (the interest paid on refunds from 1921 to July 1, 1932) would be $48,000,000. The annual expense of operating the Board of $575,000 is but a trifle over one per centum of this amount.

As the situation now stands, it is the taxpayer who pays interest at 6 per centum upon his deficiencies unless he himself insists on paying the tax and seeking a refund later. This arrangement appears to be infinitely less expensive to the Government. Unless we had a sufficient number of District Courts to act with a speed not often achieved, the annual interest bill to the Government which would follow payment first and refund afterwards, would almost alone force the creation of the Board.

An officer of the Bureau of Internal Revenue recently said, "The Board of Tax Appeals has permitted a scheduled performance of Bureau functions that would have been impossible without the Board." With an appeal to the Board open to the taxpayer before he pays his money, it is possible for the Bureau to pass upon his protest expeditiously with an assurance that no devastating hardship will result to the taxpayer. Before the creation of the Board whenever a decision by the Bureau threatened great financial hardship to the taxpayer, there was great reluctance on the part of the men in the Bureau finally to rule against the taxpayer. Action was frequently stayed by the hope of the Bureau man that the question might be so definitely settled by some pending litigation, or by future legislation, that the responsibility for a fatal decision might not be his. The result was that the ultimate decision of the Commissioner was often delayed for long periods. Now we may have an earlier clearance by the Commissioner of the "tough" case with a resulting quicker consideration of the next dispute.

This may appear to be merely "passing the buck" to the Board of Tax Appeals. There is something in this but the change has, nevertheless, expedited actions because the time intervening before the case comes on for trial may be used for further consideration by the Bureau. More than half the cases appealed to the Board have been settled before trial by this process. Were these cases on the calendars of the District Courts throughout the country, the problem of settlement would be immensely increased. One who has not experienced the delays in the settlement of a suit for refund in a District Court, first through the United States District Attorney, next the Department of Justice, then the Office of the General Counsel of the Bureau of Internal Revenue with final approval by the Commissioner of Internal Revenue, as opposed to direct negotiations with the Bureau on Board cases, can hardly appreciate the superior facility of settlement afforded by the concentration of cases before one tribunal. This is a large credit item for the Board.

Elaboration is hardly necessary of the importance to the taxpayer of settling any dispute before he is compelled to pay. The beneficence of this arrangement has never been more apparent, however, than in the last two years. It is disturbing enough to be charged with a tax one has not expected. In view of the recent decline in most taxpayers' quick assets, such news comes as a shock. If this were to be followed by demand for immediate payment (as it probably would have been in the pre-Board days), recovery of the recipients of these notices would probably be less frequent. Thanks to the Board procedure the taxpayer's views are given full hearing before he is compelled to pay, even if that be the final outcome. Not all who have dealt with the Board of Tax Appeals are enthusiasts. To lawyers accustomed in courts of first instance (such as the Board is) to a decision from the bench, or in a few days after argument, it is not pleasing sometimes to endure the long delays now frequent before a decision is rendered. The product of the Board members is uniform neither in quantity nor quality. Too many cases are forced to the Board by immature decisions of the Bureau of Internal Revenue. Processes of appeal from the Board are not as clear as they might be.[5] Most of these defects, however, and others which might be mentioned, appear to be chiefly "growing pains." It is believed that most of them are faults which are slowly being ironed out in a fashion as reasonably satisfactory to the bar as such things may be.

While all of the Board's decisions cannot be said to be consistent with each other, their consistency will stand comparison with those of the United States Circuit Courts of Appeal, the Court of Claims and, with all due respect, one other court. Certainly the Board's decisions are steadily weaving a fabric of tax law undiscoverable in the grouped opinions of the United States District Courts.

Something statistical as to the legal calibre of the Board's decisions may be said in conclusion. Through June, 1932, the Board has rendered 16,865 decisions which may fairly be called appealable. From these 1,995 appeals have been taken—less than twelve per cent. Of the 1,459 decided appeals,

3. This is without deduction for the average annual fees paid into the Board of $77,800.

4. In other words the Commissioner has claimed from the taxpayers over 300 per centum of the amount they are eventually determined to owe.

5. See "An Anomalous and Topsy-Turvy Appellate System," James Craig Peacock, American Bar Association Journal, January, 1933.

928 have been affirmed and 428 reversed. Those modified are 103. Before the Supreme Court the affirmations (though partly evidenced by denial of applications for writs of certiorari) are even more complimentary to the Board.

Statistically the result is that 88 per centum of the appealable decisions are accepted and of the remaining 12 per centum more than 7 per centum are affirmed. "Ninety-five per centum satisfaction" is not a bad slogan. These results should assure anyone as to the quality of the lawyers who sit on the Board. The guess is ventured that there are few courts of the reader's acquaintance, from which appeals may be taken without restriction, where 88 per cent of the decisions are acceptable to the rival counsel.

A MOVEMENT TO STIMULATE THE WRITING AND STUDY OF THE LEGAL HISTORY OF THE UNITED STATES

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EVER since the law of this country has been considered, whether in decisions or in other expressions of legal opinion, its history has, from time to time, been dealt with. Our legal scholars, both great and small, judges, practitioners, and teachers have done, and are still doing, work of great value in the field of legal history. Major projects are being undertaken and some have been completed by such organizations as the American Historical Association, the American Council of Learned Societies, and certain law schools. Probably many other groups, not known to the writer, are likewise doing excellent work in this line, and he feels sure that the new committee of the Association of American Law Schools, whose membership will be stated at the end of this article, will be very happy to learn of their undertakings and accomplishments. But it is believed that prior to the present movement no attempt toward *concerted* effort to stimulate the writing and study of the legal history of the United States has ever been made.

At the December, 1931, meeting of the Association of American Law Schools the writer suggested that it would be of value to the legal profession to investigate the feasibility of writing a legal history of the United States. The idea was favorably received. A study of the matter was made the business of the Council on Jurisprudence and Legal History. To the council were elected Dean C. J. Hilkey, Emory University, E. W. Hinton, Chicago University, H. E. Whiteside, Cornell University, J. H. Wigmore, Northwestern University, and Carl Wheaton, St. Louis University, Chairman. The council began to function without delay. Letters were sent to about eighty law schools asking their faculties what they thought of an attempt to write a legal history of the United States and how one should go about the task. On the whole, opinion was favorable to such an undertaking. Of course, there was some very strenuous dissent, but all felt it wise to encourage the study of legal history. Some believed we should merely make more accessible what now exists and what may later be prepared. This could be done by making a thorough bibliography and by collecting materials and publishing them in a set of books. Those who believed that a history should be attempted varied in their conceptions of how it should be done. Some thought that state histories should first be attempted and that later a board of editors should write a history from them. Others thought such a preliminary step was unnecessary.

The council felt that this movement should not be confined to its association. Therefore, the chairman proposed to the president of the American Bar Association, Hon. Guy A. Thompson, that his association appoint a committee to co-operate in the investigation. At the spring meeting of his executive committee the suggestion was acted upon favorably. The committee consists of Earle W. Evans, Wichita, Kansas, chairman, Robert H. Jackson, Jamestown, N. Y., and Dean James Grafton Rogers, University of Colorado, recently Assistant Secretary of State. This group is carefully considering our joint problem, and individual members have offered valuable plans.

The reaction of certain judges to the project was also sounded out. All who were approached on the matter were interested and willing to co-operate. Chief Justice Hughes believes that the federal judges can best act in an advisory capacity and is willing that they should do so. Not only was it thought that lawyers generally should have a part in forwarding the study of our legal history, and considering whether or not an attempt to write a legal history of our country should be made, but also that others who would naturally be interested in it should be invited to work with us. The writer, therefore, corresponded with the proper executives of the American Historical Association. A hearty response was forthcoming, and valuable aid in these preliminary steps has been given by influential members of that organization.

At the 1932 meeting of the Association of American Law Schools, held in Chicago during the Christmas holidays, its Council on Jurisprudence

and Legal History devoted its session to a discussion of the study of our legal history. The address was made by Professor Joseph H. Beale of the Harvard Law School, his subject being "The Writing and Teaching of American Legal History." He suggested the importance of the study of American Legal History, not merely because we can thus better understand the beginnings of our law than we could without its aid, but also because legal history means as well a study of each important development of law as it reacts to new social conditions. This, he stated, is true particularly because each such development indicates how law responds to social change and, therefore, forms a means of predicting the development of future law. He warned against delay in saving the source material of our legal history. He said that our present task was research in local legal history, and that after this work is done the deck will be "clear for the inspired and learned historian of American law." Further, he stressed the necessity of the co-operation of all branches of the law in order to do this properly, and, therefore, asked that a committee be appointed to forward the establishment of an organization to advance the study of our legal history. Teaching legal history, he thought, at this time, because of lack of proper material, should be confined to graduate courses. There was a spirited discussion of the paper by Dean A. M. Dobie, University of Virginia, Hans T. Froelich, graduate student at Columbia University, Julius Goebel, Columbia University, Linus A. Lilly, St. Louis University, Myres S. McDougal, University of Illinois, Richard B. Morris, College of the City of New York, secretary of the Committee of Legal History of the American Historical Association, Walter Nelles, Yale University, and William F. Walsh, New York University. It was hoped that a member of the legal history committee of the American Bar Association could be present to address the meeting. An urgent invitation was sent to the chairman, but neither he nor other members could attend because of pressure of professional business.

It would be of real value to American lawyers if at least a synopsis of all that each of these men said could be published, but the space allotted to this brief article permits but a suggestion of their contents. All but one of them believed that there should be a more intensive study of American legal history than there has been in the past, the majority of the speakers agreeing with most of the ideas of Professor Beale's talk. Several emphasized the need of taking immediate steps to halt the loss of source materials. The chief objections to the thoughts expressed in the address under discussion were three. Some believed that organized effort in the writing of legal history would "attract able men from useful independent inquiry to less useful work under its auspices." The tendency would be "to substitute a false value—ground coverage—for the real one—understanding." Furthermore, it was thought that there should be no supervising or coordinating of work, but, rather, that materials already written and to be written by scholars working independently should be collected. On the other hand, there were those who had no grave fears that the suggested organization would become bureaucratic and dampen the ardor of American scholars. At least one man thought it would be difficult to find people who would be qualified to do the work necessary in writing our colonial legal history. To do that adequately one, he said, would have to have not merely a knowledge of colonial legal literature, but also a comprehensive understanding of English law of that period. Again, several believed that the teaching of legal history should be started by undergraduates, the thought being if this were not done, there would be few lawyers who would ever have supervised study of legal history, since not many law schools have graduate courses. At the end of the seminar it was decided that the following motion should be presented at the final business meeting of the association: "It is moved that a committee of seven be appointed by the president who shall invite the cooperation of selected members of the American Historical Association and of the bench and bar for the purpose of establishing an organization to further the study of American legal history." This motion was so made and passed with but few dissenting votes. In response to this action of the Association of American Law Schools, its president, Dean Charles E. Clark, of Yale University School of Law, has appointed a committee consisting of Joseph H. Beale, Harvard University, Chairman, and Dean A. M. Dobie, University of Virginia, Julius Goebel, Columbia University, Myres S. McDougal, University of Illinois, F. S. Philbrick, University of Pennsylvania, J. H. Wigmore, Northwestern University, and Carl Wheaton, St. Louis University.

Although, because of the necessary brevity of this report, due to prior commitments of this journal, the writer has had to paint with a very broad brush, it is hoped that the publication of this statement will lead many lawyers to take an active part in forwarding the movement that is now on foot to stimulate the study of our legal history.

AMERICAN BAR ASSOCIATION

COMMITTEE ON COMMERCE

ANNUAL MEETING TO BE HELD IN THE BUILDING OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK, 65 LIBERTY STREET, NEW YORK

AGENDA

Tuesday, April 11

10:00 A. M. 1. Suggestion of new subjects.
2. United States Contract and Sales Bill.
3. Bill providing for payment of interest on judgments rendered against the United States.

2:00 P. M. 4. Encroachment by Government on Domain of Private Business.

Wednesday, April 12

10:00 A. M. 1. Proposed amendment to Federal anti-trust laws.

2:00 P. M. 2. Revision of the Calendar.

Thursday, April 13

10:00 A. M. 1. Bill relating to motor vehicles used in interstate commerce.
2. Amendments to Federal arbitration law.

2:00 P. M. Executive Session.

DEPARTMENT OF CURRENT LEGISLATION

State Sanctioned Trade Restraints

By Paul J. Kern

"MONOPOLY" and "trade restraint" are evil names deeply embedded in the common law.[1] For several centuries judges labored to instill in these terms a crystallized content; and after this was fairly well accomplished, under an economic system quite different from the present, they were enacted into statute law by forty-one American states,[2] and by the Federal Government.

Myriad literature has been diffused of late regarding the ever heightening controversy as to the wisdom of these acts.[3] This matter of wisdom does not concern us here. What are interesting from the current legislative standpoint are the increasingly frequent raids conducted by legislatures on particular outposts of the Sherman Act philosophy. Especially has this tendency been marked during the past year. Indeed the more noteworthy legislative contributions during that period of stress are indications of what seems to be a fairly definite trend to throw overboard a large portion of the free competition creed as applied to certain fields of activity. Even without detailed analysis, which limited space prevents, the recent acts suggest a genuine and far-reaching legislative effort to break loose from economic dogmas which have failed to work.[4]

Restraints on Production Competition

Oil.

Because there is no legal title to any specific amount of sub-surface oil, desperate pumping is the only means by which owners can prevent their subterranean oil supplies from being exhausted by neighboring wells tapping the same pool. The inevitable competitive outcome of this situation needs no elucidation. It has been fully discussed elsewhere.[5] Most recent, and one of the most rigorous of the legislative efforts to remedy this situation, however, is the Mississippi act of May 18, 1932,[6] a sweeping legislative reform of oil production methods.

A state oil and gas board of four is created[7] which has power to prevent waste, and broad general powers to prescribe certain methods and equipment for drilling wells. The really vital grant of power from our standpoint, however, is included in section 9 which says:

"The state oil and gas board is authorized to so regulate the taking of natural gas, crude oil, or petroleum from any or all common sources of supply, within the state of Mississippi as to prevent the inequitable or unfair taking from a common source of supply of natural gas, crude oil, or petroleum by any firm, person, or corporation, and to prevent unreasonable discrimination therein."[8]

The statute proceeds to regulate very definitely, on an acreage basis, the permitted taking of natural gas, allowing a scale of producing varying from seven per cent of the open flow capacity of the well on tracts of less than five acres to twenty-four per cent of the open flow capacity on tracts of more than 160 acres (with certain other allowances).[9]

The law goes even farther than this, however, and permits cooperative agreements for the exploitation of oil pools among operators with separate holdings in the same field, and provides that such agreements, when approved by the oil and gas board, shall not be within the compass of the state monopoly and trade restraint statutes.[10]

Clearly this is an effort, on a statewide scale, to permit planned production in the oil industry. It is important to note that comparable regulations in Oklahoma and California have in two recent United States

1. The origins of these concepts apparently date back to Magna Charta (See Mitchel v. Reynolds, 1 P. Wms. 181, and Claygate v. Batchelor, Owen, 143) and with varying content the terms have served varying purposes through the centuries. The sanction was used in the 16th century to break down the trade monopolies of the feudal system, as in Sir George Farmer and Brooks case, 1 Leon. 142 (1589) in which it was held that the Lord of Tocester could not prevent an upstart from running a bakery even though the Lord had a prescription. It was used later to prevent guilds from running roughshod over the business structure, as in the case of the Tailors of Ipswich, 11 Co. Rep. 53a (1615), in which it was held that in spite of a rule of a corporation of tailors, a servant could do tailoring for his master. (The law was really quite liberal with these early labor unions, however, on the whole. See Chamberlin of London's Case, 5 Co. 62b (1591), Moore, K.B., pl. 259 (1660-85), and the Wardens and Corp. of Weavers in London v. Brown, Cro. Eliz. 804 (1601). The greatest stimulus to the law of restraints, however, came from repeated efforts to restrain the exercise of trades by individuals, which were thoroughly uneconomic restraints in the social system that existed. See Mich. 29 Eliz., 2 Leon. 210 (1587), Moore, K.B. 241 (1588), Moore, K.B. 115 (1578), Colgate v. Bachelor, Cro. Eliz. 872, Owen 143 (1602), Clark v. Taylors of Exeter, 3 Lev. 242 (1603), Broad v. Jollyfe, Cro. Jac. 596 (1620), also Noy. 98, Michell v. Reynolds, 10 Mod. 27 (1712), also 1 P. Wms. 181, Barrow v. Wood, March N. R. 191 (1643), Ferby v. Arosmyth, 2 Keb. 377 (1669). These decisions on contract restraint finally crystallized the common law as it came down to present times that a limited (in area or otherwise) restraint could be good even though a general restraint were bad. Rogers v. Parry, 2 Bulstr. 136 (1614), Bragge v. Stanner, Palm. 172 (1622), Hunlocke v. Blacklowe, 2 Wms. Saunders 156 (1671), Chesman v. Nainby, 2 Strange 738 (1727). The methodology developed by the courts in these cases was carried over into business contracts, Gale v. Reed, 8 East 80 (1806). The *stare decisis* development on lines involving a distinction between covenants and simple contracts does not concern us. See Mitchel v. Reynolds, 1 P. Wms. 181 (1711).

The law regarding monopoly seems to have developed quite separately as a phase of the relationship between the courts and the royal power. In this development the courts early asserted their power to overthrow such of these monopolistic grants as seemed to be unwise. Heddy v. Wheelhouse, Cro. Eliz. 558 (1596), Waltham v. Austin, 5 Co.—(41 Eliz.) (1599), Case of Monopolies, 11 Co. Rep. 84b (1602), City of London's Case, 8 Co. 121b (1610), Mayor of Colchester v. Goodwin, Carter 68 (1678), (a case involving a custom rather than a royal grant). A pretty good understanding of police necessities, perhaps the forerunner to public utility regulation, was evidenced, however, by the courts in upholding the limitation on the number of carts in London (a by-law of the corporation). See Player v. Gardner, 2 Keb. 873 (1672), Player v. Vere, Raym. Sir T. 324 (1670), Player v. Jenkins, 2 Keb. 27 (1667), also 1 Sid. 284. Contracts tending to monopoly were similarly bad, Thompson v. Harvey, Comb. 121 (1688) but economic planning was valid at common law, even by city corporations, Silk Throwsters v. Freemanter, 2 Keb. 310 (1669). Statutory economic planning on a large scale in England had been tried much earlier, St. 25 H. VIII, c 13 (Pulton, 1670, page 446.)

2. Vol. XXXII Columbia Law Review 347 (February, 1932).

3. *See* Proceedings of the Symposium on the Anti-Trust Laws, conducted at Columbia University in December, 1931, published by the Commerce Clearing House. (Prof. Milton Handler, chairman.)

A Study of the Anti-Trust Laws. Vol. XXXII Columbia Law Review 173ss.

The Anti-Trust Laws of the United States. The Annals of the American Academy of Political and Social Science. Vol. CXLVII, Jan., 1930.

4. The acts covered by this survey are: Acts of 1932—New York, Mississippi, South Carolina, Virginia, New Jersey, Massachusetts, Louisiana, Arizona, Michigan, Wisconsin, Pennsylvania, Indiana, Rhode Island, Illinois, Ohio, Kentucky; Acts of 1931—Ohio, Mississippi, Massachusetts, Georgia, South Carolina, Maine, and Tennessee; Acts of 1930—Mississippi, Louisiana, and Louisiana Constitutional Amendments. (Though the Maine Legislature met in 1932 the printed acts were not available at the time this article was prepared.)

5. The best recent discussions of this situation are: Donald H. Ford, 30 Michigan Law Review 1170, June, 1932, Controlling the Production of Oil; XXXI Columbia Law Review 1170, November, 1931, Legislative Stabilization of the Oil Industry; 3 So. Calif. Law Rev. 396, Stabilization of the Oil Industry and Due Process of Law.

6. Laws of Mississippi, 1932, Ch. 117.

7. *Ibid.* Sec. 1.

8. *Ibid.* p. 318.

9. *Ibid.* Sec. 38.

10. *Ibid.* Sec. 40.

Supreme Court cases been upheld as constitutional,[11] though an attempt to accomplish the same result by executive use of troops under a martial law pronouncement seems to be bad.[12]

Cotton.

The condition of the cotton farmers needs no comment. Two state legislatures went down the line with their cotton constituencies at recent sessions. Mississippi contributed the less radical of these statutes by limiting cotton planting (in 1932) to not more than thirty per cent of the acreage planted in all crops of the preceding year (with an alternative later noted). The bill was drafted with some skill on a conservation of soil fertility pretext and might have been constitutional. The fact that it was not to go into effect unless states producing seventy-five per cent of the cotton grown in the United States adopted similar legislation, which condition did not occur, prevented a genuine test of commodity production planning.[13]

The law prevented the planting, during 1932, of "cotton or other soil exhausting crops, except feed crops for man and domestic animals, or either, in excess of thirty per cent of the area . . . , which was in cultivation in planted crops during the crop year 1931."[14] Later, however, it is provided that no penalty should attach under the act to any planter whose acreage in "cotton or other soil exhausting crops" during 1932 did not exceed fifty per cent of the cotton acreage planted in 1930.[15] In other words there was actual limitation, with the planter permitted to plant either thirty per cent of his total 1931 acreage to cotton or fifty per cent of his 1930 cotton acreage, whichever he wished. The act attached fairly slight penalties for its violation.[16]

More sweeping in terms was the South Carolina cotton statute passed in a special session in 1931, which completely prohibited the planting of cotton in 1932, made it a crime to do so, ordered the destruction of same where found, and outlined the means of enforcement.[17] This statute too, however, had the seventy-five per cent clause, and consequently never went into effect.

That these activities received sympathetic attention of at least one other southern legislature is evidenced by a Tennessee resolution of November 21, 1931, appointing twelve commissioners to represent the state at a cotton conference in Jackson, Mississippi.[18]

The seventy-five per cent condition in both of the statutes actually enacted demonstrates also the recognition that a single state is powerless by itself to substantially control the production of an important commodity, and the failure of general adoption, and indeed the wide disparity in the acts actually adopted, indicates the almost insuperable difficulties besetting joint action by states.

Restraints on Marketing Competition (Producers)[19]

Sea-food, Clam, Fish Cooperative.

The agricultural cooperative has long been a well established marketing unit,[20] but it remained for Louisiana to grasp the possibility in 1932 of expanding this form of association to meet the needs of another hard-pressed industry. Thus was born the Louisiana Sea-food Cooperative Law, an ingenious extension of the agricultural marketing system to an analogous set of facts,[21] and a significant stride toward legislative acceptance of economic planning.

The Louisiana law, or rather three Louisiana laws passed at the same session taken together, sweep aside with a grand gesture the vestiges of the old marketing competition. "In order to promote . . . the intelligent and orderly marketing of sea food products through cooperation, eliminate speculation, unnecessary middlemen, and waste," runs the statement of policy,[22] "to make the distribution of sea food products as direct as can be efficiently done between producer and consumer, and to stabilize the marketing of such products, this act is passed."

Any person, either natural or corporate, can help form associations. The cooperatives, after formation, have power to engage in any activity in connection with marketing or "catching, gathering, preserving, drying, processing, manufacturing, canning, packing, grading, storing, handling, or utilization" of sea food products for their members, among other tihngs.[23] The marketing contracts may bind members to sell only to the association for ten years,[24] and a threatened breach of such contract is enjoinable in the courts[25] and the threatener may be put under $500 bond. Liquidated damage clauses in the contracts will not be regarded as penalties,[26] and an attempt to induce an association member to breach his marketing contract is made a misdemeanor, punishable by $100 to $1,000 fine, and making the intruding third party liable to a penal sum of $1,000 additional to be paid to the association aggrieved.[27]

Louisiana bolsters this with another specific provision preventing the intrusion of out-of-the-state competition into the local sea food harvest,[28] which means that the Louisiana associations may establish a complete monopoly under the law; and such monopoly receives the further sanctification of the state by a specific exception written into the state anti-trust laws by the same legislature.[29] This anti-trust law exception, it should be noted, operates only in favor of contracts approved in writing by the State Commissioner of Conservation,[30] but is broad enough, on the other hand, to permit restraining contracts between persons not members of cooperative associations.

Agricultural Cooperatives.

The agricultural cooperative is the most common form of legalized pool. Under stress of the times these associations have received generous legislative treatment in the past two years. Most important of these, probably, is the newly revised New York law,[31] which permits marketing agreements which restrain the sale

11. *Champlin Ref. Co. v. Corporation Commissioner*, 286 U. S. 210, 52 Sup. Ct. 559 (1932); *Bandini Petroleum Co. v. Superior Court*, 284 U. S. 8, 52 Sup. Ct. 103 (1932).
12. *Sterling v. Constantin*, U. S., 77 L. Ed. 254 (1932).
13. General Laws of Mississippi, Extra Sess. 1931, Ch. 1.
14. *Ibid.* §2.
15. *Ibid.* §7.
16. *Ibid.* §7.
17. So. Caro. Acts 1931 Spec. p. 1095. Crim. Code 1932 §1288A.
18. Tenn. Acts of 1931, Res. No. 13.
19. For a discussion of the distinction between assembling contracts and distributing contracts, i. e. the distinction between producer marketing and retail marketing here drawn in this outline, *see* Karl N. Llewellyn, Cases and Materials on the Law of Sales (Callaghan) p. 3. (1930.)
20. *See* John Hanna, The Law of Cooperative Marketing Associations. Ronald Press (1931). For a note on the constitutionality of these cooperative marketing statutes, see 77 A. L. R. 391 (1932), also Liberty Whse. Co. v. Burley Tobacco Growers Coop. 276 U. S. 68, 48 Sup. Ct. 291 (1927).
21. Acts of 1932, No. 86.
22. *Ibid.* §1.
23. *Ibid.* §5-a.
24. *Ibid.* §16.
25. *Ibid.* §17-b.
26. *Ibid.* §17-a.
27. *Ibid.* §25.
28. Acts 1932, No. 50.
29. Acts 1932, No. 206.
30. *Ibid.* §2.
31. Laws of 1932, Ch. 383.

of products of individuals to and through the association,[32] establishes liability in damages for inducing a breach of such contract,[33] and permits the use of injunctive sanctions to enforce such contracts.[34] Only persons who produce agricultural products (or cooperative associations of them) are eligible for membership in the cooperative.[35] This farm cooperative law is supplemented in New York by a new statute which cancels the ancient competitive right to dump or destroy farm products in order to raise the price of the remainder,[36] strongly suggesting that the legislature is approaching this problem from a social rather than an individualistic viewpoint.

Mississippi revised its agricultural cooperative association law of 1922[37] in 1930,[38] and also amended the 1928 Agricultural Association law,[39] so that any agricultural organization, whether it be organized under the Agricultural Association law or not, could join a federation of cooperative associations as allowed by the Mississippi law.[40]

Indiana grafts an interesting variation onto the agricultural association movement by appropriating money to help defray the expenses of dairymen's, poultrymen's, livestock breeders', corn growers' and vegetable growers' associations.[41]

Restraints on Marketing Competition (Retailers)[41a]

Chain Store Taxation.

Probably due to the determined validity of the Indiana chain store tax in 1931,[42] there has been a wave of chain store taxation within the past two years that burdens with various degrees of onerousness the business of operating multifold retail outlets under the same ownership and under centralized management. These statutory raids on the chain store system are, of course, due to the political power of the middle class business men who are being very injuriously affected by the competitive advantage which large scale operation gives to the chain store.

The taxation of chain stores assumes various forms, and bears with varying degrees of rigorousness. The commonest is the license tax, and Louisiana has contributed one of the toughest of these. The Louisiana act[43] taxes chain stores by the store, with the heaviest per store burden on the largest chains. Thus if a single operator runs two to five stores his license per store is only $15, while the fifty store operator pays $200 a store, or a minimum of $10,000 per year.[44] This is in addition to taxes paid by the chain stores in common with all other stores[45] and the corporation franchise tax assessed the same year.[46]

The Huey Long commonwealth is only one of several that have sallied forth against the chain store, however. Wisconsin, though a bit more tame, preceded by several months the Louisiana foray, with a chain store tax passed in a special session in 1931.[47] This number is also in the form of a license tax, with rates from $10 a store for stores under six, to $50 a store for each store over twenty.[48]

In the same year Arizona passed a statute to the same effect[49] with a license fee ranging from $3 on one store to $25 for each store in excess of twenty.[50]

In spite of the fact that Mississippi rates at the very bottom of Mr. H. L. Mencken's list of American states in order of culture,[51] it has shown some originality in its attempts to guillotine the chain stores. The Mississippi tax is levied on the "gross income" (sales tax) of retail stores and lies on them all at a one-fourth of one per cent rate.[52] But in the case of chain stores ("more than five stores") there is levied an additional tax of another one-quarter per cent, burdening the chain with twice the amount of the non-chain enterprises.[53] Thus on every dollar sale the chain store pays two and a half mills more tax than its small scale competitor who controls the state legislature.

Oleomargarine.

Hard, indeed, is the lot of him who would market a synthetic farm product. He must resign himself, in such times as these, to an unsympathetic attitude of the farmer-legislators towards free competition in his goods. Oleomargarine would seem to be the most vulnerable of such products; and rich indeed is the legislative fruit of anti-oleomargarine legislation of late.

It would seem to be judicially settled that oleomargarine is a harmless and nourishing product.[54] In spite of *Powell v. Pennsylvania*,[55] it is doubtful whether a state could constitutionally prohibit outright the sale of oleomargarine within its borders. So no outright prohibitions are found. Oleomargarine is merely "taxed."

The Kentucky "tax"[56] starts at ten cents a pound on the sale, with an additional assessment of $5 a year on every manufacturer, $3 on every jobber, and $2 on each retailer. Each hotel that serves oleomargarine must pay an additional $3 tax; each restaurant, pie wagon, club and what-not, $2, each boarding house $1. All persons who serve oleomargarine must post conspicuously on all four walls: "Oleomargarine Served Here," and if menu cards are furnished the same must be conspicuously printed on them. Each tub, firkin, box, or package containing the product must be labelled on the top, sides, and bottom: "Oleomargarine." All manufacturers and jobbers shipping oleomargarine into the state are required to forward to the state tax commission the date, amount, car number, consignee, and a list of brands.

Wisconsin contributes a different but equally oppressive oleomargarine tax.[57] Each manufacturer is charged an annual license fee of $1,000, and each wholesaler is charged $500. Retailers, hotels and restaurants must pay $25 a year, boarding house, bakery, and candy store proprietors, $5.[58] In addition to payment, copious records must be kept by all persons handling oleomargarine,[59] and on the filing of his weekly records the retail dealer must pay an additional six cents a pound tax, and each hotel, restaurant,

32. *Ibid.* §95.
33. *Ibid.* §21.
34. *Ibid.* §95 (3).
35. *Ibid.* §3 (8).
36. Laws of New York 1932, Ch. 204, §246 (4).
37. Ch. 179.
38. Laws of 1930, Ch. 10.
39. Ch. 295.
40. Laws of 1930, Ch. 109.
41. Laws of 1932, Ch. 31.
41a. See Footnote 19, *supra.*
42. *Tax Comm. v. Jackson*, 283 U. S. 527 (1931).
43. Acts 1932, No. 19, p. 125.
44. *Ibid.* §3.
45. See c. 190, at p. 618, Laws of 1932.
46. Acts of 1932, No. 8.
47. Laws 1931, spec. sess., c. 29, sec. 5.
48. *Ibid.* §5 (3).
49. Laws 1931-32, c. 9.
50. *Ibid.* §5.
51. Mr. H. L. Mencken is not always correct. He predicted, for instance, the re-election of Herbert Hoover in 1932. See American Mercury, January, 1933, p. 3 for admission of this blunder.
52. Miss. Laws 1930, c. 90.
53. *Ibid.* Art. I, sec. 2-c.
54. *Jelke v. Emery*, 193 Wis. 311 (1917).
55. 127 U. S. 678 (1888).
56. Laws 1932, c. 158.
57. Laws 1931-32, spec. sess., c. 3.
58. *Ibid.* §3.
59. *Ibid.* §7.

boarding house, bakery, and candy store must do the same.[60] The act also throws in for good measure a few posting requirements (with additional expense),[61] and prevents any action in "any" court[62] for the restraint or delay in collection of the tax.[63]

The Wisconsin legislature coyly declares its purpose to be "the raising of revenue,"[64] but perhaps the real reason was more frankly stated the same week when the legislature memorialized Congress to "enact legislation to prohibit the manufacture and sale of oleomargarine . . . throughout the United States."[65]

Not satisfied with their handiwork, however, the Wisconsin legislature went on a month later (January 28, 1932), with amendments that pretend to bring consumers within the scope of the tax. Thus, if a consumer buys direct from an outstate manufacturer, he is liable for a one dollar plus six cents a pound license for the privilege of using oleomargarine.[66]

Compared with this thoroughgoing legislation the Mississippi tax of 1932 looks half-hearted. Mild Mississippi imposes a levy of only $10 a store on retail dealers in oleomargarine, though it does fasten a $100 burden on wholesalers.[67] It is very likely that this is a genuine revenue measure, and as such does not belong within the compass of this article. This is, in fact, only a minor amendment of the 1930 revenue act that imposed a $5 tax on retailers and $100 on wholesalers.[68] It is to be noted, however, that no tax whatever is laid on sellers of butter and only a small tax on creameries ($15 to $50).[69]

Ohio adds to oleomargarine regulation an act preventing the sale of the artificially colored product.[70] Louisiana injects a note of humor by taxing oleomargarine one and one-quarter per cent on its gross sales to provide a fund for tick eradication.[71] The act is not as ludicrous as it would seem, however, since all dairy products are taxed for the same purpose, and in order to prevent a trade advantage to oleomargarine it is necessary to bring it along. It is fair to argue, none the less, that as long as oleomargarine factories are not infested with ticks, they should not be required to bear a part of the necessary manufacturing cost of their competitors' products.

Restraints on Service Competition

Trucks and Buses.

It is quite apparent that the building of lavish state rights of way for trucks and buses has put railroads at a competitive disadvantage. A full discussion of this situation is beyond the scope of this article,[71a] but it is worth noting here that numerous state legislatures show a present tendency to equalize the competitive position of these carriers by legislation. The element of waste prevention and conservation of existing investment, by eliminating duplicate service over the same route, is a further factor in the enactment of these statutes.

The new Kentucky statute is perhaps the frankest effort to deal with the bus and truck problem.[72] All carriers for hire are required to secure certificates of public convenience and necessity, and "In granting or refusing to grant such certificate, the Commission shall take into consideration the effect that the proposed operation may have upon public transportation business and facilities of *every character* with the territory sought to be served by the applicant, the public need for the service the applicant proposes to render, the ability of the applicant efficiently to perform the service for which authority is requested, and the effect upon the highways and upon the safety of the public using such highways that will probably result from the granting of such application."[73] The statute then goes on to say that "Every contract carrier is hereby forbidden to give or cause any undue or unreasonable advantage or preference to those whom he serves as compared with the patrons of any common carrier, as that term is used in this act, or the patrons of any other common carrier, or to subject the patrons of any such common carrier to any undue or unreasonable discrimination or disadvantage, or by unfair competition to destroy or impair the service or business of any common carrier . . . each such contract carrier shall maintain on file with said commission a statement of his charges, and of such other matters as said commissioner may require."[74]

Massachusetts extensively revised and extended its bus and truck laws in 1931,[75] and the fact that railroad competition was in the minds of the amenders is evidenced by use of the phrase "[so operated] as to afford a means of transportation similar to that afforded by a railroad company."[76] Sightseeing buses are brought under the same sort of regulation by the same legislature.[77] In the same year the state of Georgia passed an extensive regulatory statute controlling the bus and truck business.[78] South Carolina created a commission to study the bus and truck situation.[79]

Taxation, however, is an equally common way of attacking the bus and truck problem, and a recent instance of this sanction is the 1932 Mississippi statute whose rates ascend on an increasing scale to the point where six-ton trucks pay a license fee of $360 a year and a mileage tax of three cents a mile.[80]

An attempt to even up the competitive position of railroads from the opposite side is found in a 1932 New Jersey statute which specifically authorizes New Jersey railroad corporations to acquire stock of other railroads or any other carriers.[81] The statute seems broad enough to permit the acquisition of bus and truck carriers as well,[82] and if this is true, it will greatly relieve the competitive pressure of gasoline carriers against New Jersey railroads. (State laws such as this, of course, do little good if the Interstate Commerce Commission proves hostile).

Conclusion

It is fair to suggest that these continued legislative forays are straws indicating a fairly marked trend against the Sherman Act system. It is possible, of course, to accept these alterations merely as extensions of the large and immemorial class of enterprises to which the common law never applied its competition

(*Continued on page* 248)

60. *Ibid.* §8.
61. *Ibid.* §6.
62. Clearly could not include Federal courts.
63. *Ibid.* §12.
64. *Ibid.* §1.
65. Wis. Jt. Res. 17, 1931, spec. sess., p. 120.
66. Laws 1931 spec. sess., c. 17.
67. Laws 1932, Ch. 89, sec. 147.
68. Laws 1930, c. 88.
69. Laws 1932, c. 89, sec. 71.
70. Laws 1931, p. 84.
71. Acts 1932, No. 17.
71a. Sec. 24, Col. L. R. 528; 28 Mich. L. R. 107, 276.
72. Laws 1932, c. 104.
73. *Ibid.* Art. II, §6.
74. *Ibid.* Art. III, §5.
75. Laws 1931, c. 408.
76. *Ibid.* §1.
77. Laws 1931, c. 399.
78. Georgia, Laws 1931, p. 199.
79. Acts of 1931, No. 575.
80. Ch. 135.
81. Laws 1932, c. 143.
82. *Ibid.* §1-b.

THE CODE "CAUSE OF ACTION" CLARIFIED BY UNITED STATES SUPREME COURT

In the Case of United States vs. Memphis Cotton Oil Company the Court, in an Opinion by Mr. Justice Cardozo, Takes a Practical and Pragmatic Attitude Towards This Much Abused Term—Its Use for Entirely Different Purposes in Dissimilar Situations—History of Term Reviewed, etc.

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ONE of the conspicuously useless conceptual tangles confronting the modern pleader has centered about the definition of the code "cause of action." The term is used in a great variety of situations under the supposition that it has a fixed and ascertainable meaning. It may be used in deciding a demurrer to a complaint, a motion to exclude evidence as not within the issues, or a motion in arrest of judgment. It becomes relevant in determining whether "causes of action" should be stated separately, in determining how many suits may arise out of one chain of circumstances, or in deciding questions of res adjudicata. It appears whenever the question of waiver of defects in pleading is argued. It comes up on the allowance of amendments, before trial, at the trial, and after judgment, and where the statute of limitations has intervened between the original complaint and the amendment. Here the shadowy distinction between a cause of action and a new cause of action appears. It has served as an argument against "Declaratory Judgment" statutes on the theory that a cause of action presupposes executory relief. It even is occasionally made the basis of the distinction between appellate court dictum and decision on the theory that the Appellate Court decides only the "cause of action" stated in the pleadings. The definition in any one of these cases is theoretically relevant in any other. It is impossible to give it a consistent meaning. For example, we find a Federal Court deciding that an amendment in a state court constituted a "new cause of action" in order to permit removal after a plea to the original complaint. Having decided that point, the court then goes on to dismiss the case on the ground that this "new cause of action" was not a "cause of action" at all.[1]

Thus we find practical questions of joinder of causes being decided by the contemplation of this abstract definition. We find amendments which on their face look fair and reasonable in the light of the particular case, being refused out of respect for this definition which so completely lacks definiteness. Instead of a rational discretion based on trial convenience in the particular case we find an irrational discretion based on whichever of the contradictory analogies happens to be emphasized.[2]

From the attempt to make this phrase produce predictable results in this variety of unlike situations a number of mutually contradictory theories have arisen, which have much to do with legal philosophy, but nothing to do with trial convenience. For this reason anyone interested in procedural simplicity will hail with delight the opinion of Mr. Justice Cardozo in the case of United States vs. Memphis Cotton Company.[3] In this case the Supreme Court takes a pragmatic and practical attitude toward this much abused term. The opinion eliminates the necessity for abstruse legal theology in determining the question when a litigant may amend his pleadings. It points out that where the phrase is used for other purposes than in determining the propriety of amendments it must have a different meaning fitted to the procedural convenience of the situation; that analogies drawn from one situation where the term is used are not relevant arguments in any entirely different one. The effect of the opinion throws the support of our greatest court behind the simple and common sense definition advocated by Dean Clark in the Yale Law Journal in 1925, and later incorporated in his book on code pleading. Dean Clark's definition reads as follows:

"The cause of action must therefore be such an aggregate of operative facts as will give rise to at least one right of action, but it is not limited to a single right (if it is ever possible to isolate one such right from others). The extent of the cause is to be determined pragmatically by the Court, having in mind the facts and circumstances of the particular case. Such extent may be settled by past precedents but the controlling factor will be the matter of trial convenience, for that is the general purpose to be subserved by these procedural rules."[4]

What the Supreme Court did in this case seems absurdly obvious from any practical point of view

1. Henderson v. Midwest Refining Co. 43 Fed. (2d) 23 (1930).
2. Judicial discussion based on arbitrary selection of cases, out of the multitude which use the term "cause of action," is well illustrated by Hughes v. Gaston (Mass. Dec. 31, 1932), 183 N. E. 752. The plaintiff's intestate was killed on the section gang of an interstate railroad. In the original declaration the only allegation indicating interstate commerce was the fact that the railroad ran from one state to another. At the trial the plaintiff amended his petition bringing it under the Federal Employers' Liability Act by stating the deceased was injured while engaged in aiding interstate commerce. The Supreme Court of Massachusetts held that this amendment made a "new cause of action" out of the old suit. The new cause of action was barred by the statute of limitations which had run during the progress of the proceedings.

It is of course absurd to say that the defendant was misled by the absence of this technical allegation. Yet the court thought it was bound by the definition of a "cause of action" which it took from its state reports. It ignored the fact that the Supreme Court of the United States passing on the very question in connection with the same federal Employer's Liability Act in Missouri K. & T. R. Co. v. Wulf 226 U. S. 570, 33 Sup. Ct. Rep. 135, 57 L. ed. 355, Ann. Cas. 1914 B. 134 (1913) had decided that such an amendment did not constitute a new cause of action. The case in the Supreme Court of the U. S. was not even cited.

This illustrates the tendency of this general discussion to draw away the attention of the court from the trial convenience of the particular type of case under consideration. Had the court used a pragmatic definition of "cause of action" its highly technical result would have been impossible.

3. U. S. Daily 53; Sup Ct. Rep. 278 (Jan. 9, 1933).
4. Clark on Code Pleading, p. 84.

unhampered by the argumentative technique previously built around the phrase. It appears that the income tax commissioner refused to refund taxes which an investigation showed to be due the taxpayer. The ground for refusal was that the claim for refund, filed years before, was not specific enough to come within the treasury regulations. But the taxpayer tried to avoid this objection by amending his claim. The government asserted that this could not be done; that the amendment constituted a "new cause of action," and the time limit for filing "new causes of action" had expired. Under this theory it was argued that money due the taxpayer and demanded by him in proper time could not be refunded merely because of a lack of specification in the claim which in no way misled the government.

The case could easily have been disposed of on the theory that the rules of the treasury department are imposed for the convenience of that department, and mean that a more specific statement of claim can be compelled only if called for. But the Court saw its opportunity to put the case on a broader base, and utilized it to point out that this is equally true of the rules regulating the cause of action before a court. The Supreme Court explained its attitude toward the general conception of "cause of action" and indicated that in the future arguments against amendments of pleading on the ground that they changed the cause of action would be relevant only if they were correlated with trial convenience in that particular type of case.

Mr. Justice Cardozo avoided the cases conflicting with this result by pointing out that the term "cause of action" is used for entirely different purposes in dissimilar situations. As an analogy it is helpful only when "we do not insist at the beginning upon a definition of our terms" or in other words if our definition recognizes the "shifting meanings" of these terms. "A cause of action may mean one thing for one purpose and something different for another. It may mean one thing when the question arises upon demurrer to a complaint and something different when there is a question of the amendment of a pleading or the application of the principle of res adjudicata." From this it follows that logically built argument using the definition of a cause of action to produce a result conflicting with trial convenience may be brushed aside without either reconciling or overruling all the dissimilar cases which have employed the term.

To one unfamiliar with the psychological hazards surrounding attempts at procedural simplicity, it might seem strange that the evolution of such a common sense attitude should have been so difficult, and that it should be necessary for a great court to write an opinion which in effect advises lower courts to use this simple pragmatic test. Yet anyone familiar with the psychology of judicial institutions realizes that the impersonal attitude which we wish courts to take seems to be obtainable only by compelling a reverent respect for abstractions and formulae. For that respect for established formulae we must pay a price which is illustrated here by the years of argument required before a court could desert a complicated and contradictory philosophy of the nature of the "cause of action" in favor of the use of the words as descriptive of a certain necessary discretion in the trial court.

To understand why so many articles and treatises have been written confusing a phrase which in the nature of things can hardly be more than a broadly descriptive term, we must review its history. In the light of that history we can see how the notion that a trial should be simply a proof of definite issues formulated in advance made this dialectic elaboration of the "cause of action" inevitable.

When the first codes were adopted the vague picture of a common law judgment as an application of law to definite issues pleaded at the beginning of the case,—instead of to the entire case as it appeared at the end of the trial,—was held up as the only desirable ideal. The formulation of issues in advance was the basis of all the niceties of common law pleading. But common law pleading had partly avoided the necessity of coming to real issues, by inventing fictitious ones which permitted the trial to go on. The most conspicuous example of this was the pleading of the general issue to a declaration containing the common counts. This device satisfied the requirement of a definite issue by inventing a purely verbal one and compelled the parties to bring out their real case at the trial. Those to whom the logic of pleadings was more important than their convenience were constantly attacking the general issue because it was logically misleading. The record did not show what the case was about. The idea of a discovery, available to the parties, separate and apart from the pleadings, was thought of only in exceptional cases.[5] The pleadings were logically the device by which each party should learn the issues involved.

When the code shifted the emphasis away from the forms of action to the pleading of "facts," the judges assumed that these "facts" were to fulfill the function of the common law issues. They were to indicate at the same time both the general character of the evidence and the nature of the writ which would have lain at common law. The idea of deciding the case on the facts as finally developed at the trial was not seriously entertained as a philosophy, though it could not be avoided as a fact. Since by common law theory the evidence proved only the allegations of the writ, so under the codes the evidence must only prove the allegations of fact in the petition. However, at common law since the requirements for the different writs were not the same, no general definition of a cause of action was necessary. They defined the requirements of the separate writs instead. Under the codes, the existence of only one form of complaint seemed to require the general definition of a "cause of action" which would apply to all cases.

Thus the search for a universal definition started.[6] The need for it was explained on the

5. The persistence of the idea that pleadings are to fulfill the function of discovery before trial and the struggle to obtain a more sensible method of obtaining information about an adversary's case is brilliantly discussed by Professor Edson Sunderland in the January, 1933, Bulletin of the New Haven Bar Association.

6. Some able attempts to formulate a general definition of a cause of action are found in the following articles:

Pomeroy Code Remedies (4th ed. 1904) defining it as a "primary right."

Harris, What is a cause of action, 16 Cal. L. Rev. 459 (1928).

Gavit, The Code Cause of Action; Joinder and Counterclaims, 30 Columbia L. Rev. 802 (1930) (stating the cause of action on the "substantive right.")

McCaskill, Action and Causes of Actions 34 Yale L. J. 614 (1925). Cf. 5 Am. Law S. Rev. 286 (1923).

ground that without definite rules a party would be misled as to his adversary's case. The fact that the party actually might not have been misled in any particular case was never permitted to interfere with this assumption.

Since the pleadings represented the basis for the decision, questions of res adjudicata, statute of limitations, amendments during the course of trial, the decision of how many suits could be brought on one series of events and the decision as to the amount of detail required in pleadings were all lumped together, and their solution sought by deduction from a general definition of a "cause of action."

As an escape from this system the common counts avoiding definite issues appeared in code pleading, just as they did at common law. Learned writers tried in vain to discourage their use because they violated the spirit of the codes by permitting the facts as developed at the end of the trial to become the basis of the judgments instead of the issues in the pleadings. Such short form methods of pleading made a general definition of the "cause of action" even more difficult to apply.

It is not surprising that treatises attempting to reconcile such cases became very recondite indeed. They went down to the very roots of jurisprudence, and much soul searching was done at these subterranean levels. In the minds of some the cause of action was the remedial right. Whether each single remedial right was in reality a separate cause of action was a puzzle which we find reflected in briefs on motions to separately state and number causes of action, in questions of joinder of causes, in questions of whether there were several "causes of action" arising out of the same transaction, in questions of amendment where the only issue was trial convenience, and amendment where the statute of limitations had intervened, in questions of whether a new suit could be brought on the same general facts by asking for a different remedy, and in many other cases too detailed to set out here. Other learned persons developed the distinction between a primary right and a remedial right, the cause of action being the "primary right,"—from which evolved the interesting metaphysical speculation as to whether there could be a right without a remedy.

A recent case (Reed vs. Allen)[7] in the Supreme Court is a curious result of the lack of a pragmatic attitude toward the cause of action where the question concerned res adjudicata. In a dispute concerning the ownership of property a lower court in equity held that rents and profits were to be paid to A because he was the owner. To enforce this decree A brought ejectment and recovered judgment at law. Whatever the theory, the ejectment suit was actually ancillary to the equity suit. Later the equity case was reversed on appeal and it was decided that B owned the property. Then B brought ejectment. He failed in spite of the equity decision that he was the owner, because the Supreme Court held that the ejectment suit was res adjudicata. It was a cause of action separate from the equity suit, and since B had not appealed, the decision reversing the equity decree on which it was based could not aid him. B, we suppose, may still claim that he is entitled to the rents and profits because of the decree of the Court of Appeals, and thus make A's legal title obtained in ejectment of no value, but that question has yet to be tried. His appeal to the Supreme Court of the United States has resulted in giving him no information as to where he stands, in a case which has been five years in the courts.

To this opinion Judge Cardozo filed a vigorous dissent, asserting that from any pragmatic point of view there were not two separate suits involved in the case, but only one, the real issues of which the court of appeals of the District of Columbia had decided. The ideas back of this dissent became explicit in the majority opinion in U. S. vs. Memphis Cotton Co. It may be hoped that this opinion will serve to restrict the doctrine of Reed vs. Allen to its somewhat peculiar facts.

When in 1925 Dean Clark pointed out that the purpose of a definition of a cause of action was purely practical, and that it was a benefit instead of a harm if this definition permitted a court to decide the case on the issues appearing at the end of the trial instead of the beginning (providing that neither party could show that he had been surprised or injured) he was met with a chorus of dissent. The scheme would unsettle the substantive law which was based on decisions on issues raised by the pleadings; it would overtax the trial judge because he would have only a practical rule to guide him; it would confuse the distinction between law and equity already made vague by legislative attempts to abolish it; it would deprive the term "cause of action" of its distinctive characteristics so that it would no longer be a "legal" term; it would be judicial legislation. The dissenters then proceeded to point out what the "cause of action" really was. Unfortunately, however, while they were able to agree on their criticism, they were never able to agree on their definition. Therefore, such dissent from Dean Clark's practical definition served to clear the air. It showed that the most learned of scholars were unable to join together on any final formulation of a term which had to be used in so many completely dissimilar situations.[8]

In the nature of things this struggle to find a universal meaning of the term had to be undergone. In a judicial system which depends on the ideal of impersonal and universal rules for its prestige, it often happens that matters which in reality concern only trial convenience in which a large element of practical discretion is necessary, take on a "substantive law" atmosphere and are regarded as at the basis of our system of jurisprudence. This happened to the term "cause of action" because it was thought to be the successor to the common law writs on which the substantive generalizations of the common law were founded. With a different start the term might have developed more practically, but that is a matter of history. Beginning as it did, the phrase had to go through the process of attempted generalization to fit all the cases in which it was used. Only the confusion resulting from this attempt could free us from the definition, because conflicting definitions always leave courts free so long as they continue to conflict. It remained then only for some one with high judicial authority to point out that the matter had better

7. 286 U. S. 191 (1932), 17 Fed. (2d) 666 (1927), 54 Fed. (2d) 713 (1931). Cf. Note 42 Yale L. Journal 127.

8. See note 6 *supra*.

be treated with a practical attitude, since the conceptions were getting us nowhere.

So far as "cause of action" is concerned this necessary process of confusion is so complete that Mr. Justice Cardozo's opinion comes just at the right time. Many decisions have already gone over to a practical definition based on convenience and others are wavering.[9] The liberal amendment statutes have gone far to remove the technical traps in pleading. If the term "cause of action" is construed as a rule whose pragmatic application must never be permitted to interfere with the rights of the parties unless it also interferes too much with the convenience of the courts, the pleading reform intended by the amendment statutes will have been perfected. Arguments on amendments, res adjudicata, etc., under this theory will have to be addressed to the facts of the particular case. It will be impossible to confuse the issue by citing utterly unlike cases which are relevant only because the same term has been used as part of the argumentative technique.

It is therefore to be hoped that Mr. Justice Cardozo's opinion may serve to convince the doubters that there is nothing in the rule of stare decisis preventing any court from adopting a pragmatic definition of "cause of action" which permits the consideration in argument of the elements of practical convenience and discretion.

9. Toelle, Joinder of Actions—With Special Reference to the Montana and California Practice, 18 Cal. L. Rev. 459, 474 (1930); Borchard, Judicial Relief for Peril and Insecurity, 45 Harv. L. Rev. 793, 794-806 (1932); Gregory, Vicarious Responsibility and Contributory Negligence, 41 Yale L. J. 831, 840 (1932); Arnold, The Role of Substantive Law and Procedure in the Legal Process, 45 Harv. L. Rev. 617 (1932); 16 Corn. L. Q. 590 (1931); Harriss v. Tams & King, 258 N. Y. 229, 179 N. E. 476 (1932); Stafford Sec. Co., Inc., v. Kremer, 258 N. Y. 1, 179 N. E. 22, 78 A. L. R. 822 (1931); Covey v. England & McCaffrey, Inc., 233 App. Div. 332, 253 N. Y. S. 340 (1931); Whalen v. Strong, 230 App. Div. 617, 246 N. Y. S. 40 (1930). Cf. Wheaton, 18 Corn. L. Q. 20 (1932).

PROFESSIONAL STANDARDS OF LAWYERS IN PUBLIC OFFICE

THE final success of the effort of the Chicago Bar Association to affirm and uphold proper professional standards for lawyers in public office, and to secure the discipline of certain attorneys of the Sanitary District of Chicago who were charged with violating those standards, is registered in the decision recently handed down by the Supreme Court of Illinois. (No. 20357. In re Information to discipline certain Attorneys of Sanitary District of Chicago.)

The proceeding was novel, in that it arose out of facts different from those which had heretofore been passed on by the Court. But as Mr. Justice Stone stated in concluding the opinion, the charges were not new; they were simply "charges of violation of the principles of fair dealing and professional integrity, which not only are included in the training of each lawyer but which have always lain at the very foundation of the ethics of the legal profession. They are but the standards of common honesty and common conscience."

The information was filed by the Chicago Bar Association, by leave of Court, on June 17, 1930. It charges the attorneys with malfeasance in office as members of the Bar of the Court. Specifically, it declared that two of the respondents, while acting as attorneys for the district, acquiesced in the placing of an excessive number of lawyers on the pay roll of the law department of the district and in payment to them of salaries grossly in excess of the value of their services to the district, thereby permitting fraud to be perpetrated on the public. Fifty-four other respondents were charged with having received salaries from the district without rendering adequate or substantial services therefor.

The cause was referred to Hon. Thomas Taylor, Judge of the Circuit Court of Cook County, as commissioner to take proofs and report his conclusions of law and fact to the Court. The Commissioner held hearings from Dec. 19, 1930, up to and including Oct. 9, 1931, and made his report, sustaining the charges against all but ten respondents. Exceptions were filed thereto by various respondents, and by the Chicago Bar Association as to certain of them, and briefs and arguments were submitted. In the decision just rendered by the Supreme Court the principles of professional ethics urged by the Bar Association and embodied in the Commissioner's report, and most of the latter's findings of fact, were sustained, but the discipline recommended by the Commissioner was generally mitigated. It remained sufficient in each case, however, to emphasize professional responsibility in such employment.

In explaining the course adopted Mr. Justice Stone said: "It is but just, however, to make allowance for the fact that such discipline has not heretofore been meted out on these or similar charges." And he added this significant warning: "With this in view, and with the admonition to the Bar generally that knowing failure in the duty which the legal profession places upon them to protect the public interest while occupying public office may result in disbarment, the following order is entered as to these respondents." The order in question disbarred one respondent, suspended one from practice for two years, and thirteen until May 1, 1933, censured twenty-one for dereliction of professional duty, and discharged the rule as to sixteen. Four respondents had died during the pendency of the cause and as to them the proceeding was abated.

Taking up first the case of the numerous respondents charged with receiving the money of the district without rendering any services or with rendering grossly inadequate services therefor, the opinion states that "there is no contention that the number of lawyers was not grossly in excess of the number necessary to carry on the work of the department. Many of these respondents secured their appointment through the political influence of members of one or the other of the major political

parties." Their defense was based on other grounds, viz: insufficiency of proofs; no showing of motive; justification of conduct because of contract with the district for legal services; the proceeding was an effort to establish a new standard of conduct which, if adopted, should not be applied retroactively; improper joinder of respondents in a proceeding.

As to the last point, the Court pointed out that this was not a lawsuit with the formalities of common law pleading and judgment, but an investigation of the conduct of members of the Bar to determine whether they should be disbarred or disciplined. To have filed fifty-six separate cases would have involved a great deal of additional expense and time on the part of the relator and the respondents. It added, however, that the charges against each individual had been considered separately. Its view of the other points made by the respondents under consideration is sufficiently indicated by the following extracts from Justice Stone's opinion:

"While it is not charged that fraud was practiced by any of the respondents in the procurement of employment, the charge is that they became aware that their services were not necessary and that it became their duty to then withdraw from that employment, and that their failure so to do amounted to knowingly taking the moneys of the district without rendering adequate services therefor. Respondents are represented by numerous counsel who have separately presented briefs for their clients. These briefs present, in one form or another, the question whether there exists in this State any standard, heretofore recognized, by which the professional conduct of the respondents may be gauged in this proceeding. Counsel for the respondents argue that there has never been a case where this court, or any court, has disbarred or otherwise disciplined an attorney under facts and charges such as are here presented. They cite the rule frequently announced by this court that an attorney will be punished for unprofessional conduct only where the case is clear and free from doubt, not only as to the act charged but also as to the motive (People v. McCaskrin, 325 Ill. 149; People v. Baker, 311 id. 66, People v. Hickman, 294 id. 471; People v. Harvey, 41 id. 277;) and urge that as there can be no motive to violate a standard when no standard has been set up, no punishment of the respondents can be had in this case. They say that to now announce a standard of professional ethics which would require disbarment or discipline and apply it to any of the respondents would be to apply such standard retroactively. Counsel for relator reply that the already prevailing standards of conduct for members of the profession do not permit a lawyer for a municipal corporation to accept pay in public funds for many months without rendering adequate services in exchange therefor, and cite Canons 12, 15 and 32 of Professional Ethics adopted by the American Bar Association.

"It may be readily seen that whether such a case as this has previously been presented to a court does not necessarily affect the question whether standards exist by which the conduct of lawyers may be gauged. Counsel agree that no such case has heretofore come to the attention of any court. It is conceded that most of the respondents were appointed through political sponsorship. Each knew the amount of service he was rendering. Each had some judgment as to whether he was giving substantial quid pro quo. It is not, and should not be, necessary that there be laid down specific rules of conduct where a question of professional integrity is involved. A lawyer, by reason of his training, is to be charged with the knowledge that his client, whether an individual or a municipal corporation, relies, and has a right to rely, upon his good faith. Where, as here, the actual client of the attorney is not a board of trustees but the public who pays his fees, the attorney knows that he is charged with responsibility for fair dealing not only with the trustees but likewise the public. Were an information to charge only that respondents had received more compensation than the value of their services warranted, a different case would have been presented. There would then be opened a field of investigation vague and difficult of delimitation. The various elements entering into the value of professional services make it difficult to decide such a question with nicety. In the case of a private contract, where only the party contracting with the lawyer is to pay the fee, it may be said that it is only when the compensation received is, under the circumstances of the employment, so patently and grossly beyond reason as to evidence an overreaching of the client that courts will interfere with the contract or say that the receipt of such fee by an attorney may be considered unprofessional conduct. On the other hand, where his salary is not to be paid by the individual who employs him but paid from the public treasury or a trust fund, and little or no services are rendered, and it appearing to him, upon reasonable reflection, that no substantial services will, under the circumstances, be required of him, the common conscience is sufficient to set up a standard of ethics and to warn the recipient of such salary that he is taking that to which he is not entitled and cannot honestly accept, no matter what may be his contract.

"An attorney under such circumstances may not plead the shortcomings of the individuals or officials who thus wrongfully contracted with him, for he must be held to realize that if he knowingly continues in such wrongful contract he becomes a party to the wrong. Particularly is this true with the lawyer, since his understanding and training prompt him to an earlier inquiry and aid him in more quickly detecting the wrong. The charge here is that the respondents, with reason to believe that adequate services would not be required or expected of them, continued to thus take public funds knowing that they were violating their obligations, as attorneys, to deal fairly. The thing involved here is not the right of a tax-payer or of the sanitary district to recover the salaries paid, but the professional conduct of those who, as members of the legal profession, are particularly charged by the ethics of that profession with a duty to deal fairly with their clients. Neither common law pleadings nor the common law rules governing the entries of judgments are applicable to a proceeding of this character. . . Nor may technical legal defenses be called upon to aid in response to a charge against one's professional integrity where the accused knows that notwithstanding a technical defense his conduct was ethically and morally without support. Few rules could more directly tend to bring the legal profession and the courts into disrepute than one

permitting the lawyer, trained in legal technicalities, to use that training to deal unjustly with others and then urge such defense on an inquiry as to his good faith in such dealing. Fair dealing, whether it be with an individual or the public, demands quid pro quo of the lawyer, and though he should not be penalized for an erroneous exercise of judgment, yet he must, if the standards of the profession be maintained, be held accountable where it is apparent that his act was one of self-interest, directed against the interest of his client. Canons of ethics and rules of professional conduct laid down by courts ought not to be necessary to point out as prohibited that which the average intelligent lawyer knows is not fair dealing. If this be not true, then the pronouncements of the courts and the leaders of the profession that the lawyer is held to a high order of integrity become meaningless platitudes. The fact that a lawyer may have considered it ethical to take public funds without giving any substantial service therefor when it is patent to the average mind that it was not, can scarcely be said to constitute an impressive defense of good motive in answer to a charge leveled against his professional conduct.

"Though these respondents may not have known, when employed, that the pay-rolls of the sanitary district were loaded with useless attorneys, yet if they came to know that such was true, the fact that they had a contract with the district could scarcely have satisfied their own conviction as to the propriety of their remaining on that payroll. While it is true, as urged by counsel for respondents, that an attorney under these charges is entitled to be judged by the circumstances under which he acted and not under what was later disclosed, (United States v. American Bell Telephone Co. 167 U. S. 224; Briggs v. Spaulding, 141 id. 132;) yet where the circumstances were such as to indicate to a reasonable man that his employment was unnecessary and that he was receiving compensation without substantial services rendered, the duty upon him to withdraw became plain, and the fact that the trustees were consenting to the payment of unearned salaries does not show the lawyer blameless who accepted them. (People v. Gilbert, 263 Ill. 85). A lawyer who twice each month, for many months, takes a salary from the public knowing that he has rendered no service at all or no substantial service therefor is guilty of a breach of his duty to the public. It is, of course, true that no criticism can attach to a failure to render services because of illness, if there is need for the services and they can be rendered by others without further expense to the client. In what we have here said no new standard is set up, nor is it necessary to set up a new standard of legal ethics in this case. These respondents are to be judged by the standards of common honesty and fair dealing, which are not new but are as old as the profession. The canons of ethics of the American Bar Association referred to remind the lawyer that the legal profession is a branch of the administration of justice and not a mere money-getting trade. (Canon 12) The lawyer must obey his own conscience and not that of his client. (Canon 15) "A lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty as an honest man and as a patriotic citizen." (Canon 32).

"It has been the rule in this state for many years that courts are not bound by the opinions of attorneys as to what constitutes reasonable attorneys' fees but are responsible to litigants for the use of their own knowledge of the value of such services, and ought to, and will, take into consideration such knowledge. (Gentleman v. Sanitary District, 260 Ill. 317; Metheny v. Bohn, 164 id. 495; Goodwillie v. Millimann, 56 id. 523.) The fact that the sanitary district and the respondents were competent to enter into a contract may be admitted, but, obviously, such capacity cannot be urged as a defense against the charge that the attorney so contracting has been guilty of participation in the wrongful use of public funds where it may reasonably be said that he came to know that the contract he had made was one to which he ought not, in good conscience, remain a party. We are of the opinion that there exist, and have existed through the Canons of Ethics and the common conscience, sufficient standards to direct the attorney in all cases of this character not involving honest error in judgment, to which, of course, all are liable.

"Counsel argue that to disbar or discipline respondents in this case would, in effect, be making retroactive application of such rule of conduct as may be announced in the case, and that, therefore, no punishment should be imposed. It has been frequently announced by this court that conduct of a lawyer which is dishonest or violative of private rights or public good is punishable in proceedings of this character. (People v. Baker, supra; People v. Hickman, supra.) If, when gauged by these standards, the attorney's conduct is such as to subject him to discipline, such discipline is not retroactive merely because no similar acts have previously passed under judicial scrutiny. The fact that many others were engaged in similar acts, or that a certain public apathy exists as to such conduct, if it does exist, affords no justification to one shown guilty of such charge. It would, indeed, be most dangerous to approve such an excuse."

The argument that "none of these respondents was under a duty to investigate the reason for failure to assign work to him or the conditions existing in the law department, and since they did not know such conditions they cannot be criticised for waiting for work" was disposed of with this statement: "All of this was true when the employment began, but certain facts must have presented themselves to each of those respondents who gave little or no services for his salary. He knew that public funds were being paid to him without a just return. He knew that there was little or nothing for him to do. When his request for work brought nothing for him it must have become apparent to him that he was being paid for services he did not render. These were sufficient to provoke inquiry into the conditions existing in the legal department which would have disclosed compelling reasons for his withdrawal from such employment. . . ."

The charges against the head of the Law Department of the Sanitary District were next taken up. These were that "he knowingly acquiesced in the acts of the trustees placing an excessive number of lawyers on the payrolls of the law department of the district and in the payment to them of salaries grossly in excess of the value of service rendered, and that he approved and signed, thereby giving effect to, the semi-monthly payrolls of the law de-

partment knowing that they bore the names of many lawyers who performed little or no services for the money received by them, whereby he knowingly permitted a fraud to be perpetrated upon the public through such use of the funds of the district." The opinion continues:

"This respondent answered the information, setting out certain rules enacted by the board of trustees and averring that he in good faith believed, and still believes, that it was his duty, under those rules, to place upon the payrolls of the district such employees of the law department as the committee on employment of the board of trustees appointed and at the salary fixed by that committee, and that it was his duty to certify a list or statement of each employee so appointed by the committee on employment, with the salary of each, for the semi-monthly period for which the list was made, until he was notified of the discharge of the employee by that committee. He also avers that the rules of the board required him to mark 'Approved' on the payrolls prepared by the clerk, and that in so doing he was performing a duty placed upon him by the rules of the board, which he in good faith then believed, and still believes, it was his legal duty to perform, and that he could have been compelled by mandamus so to do. He further avers that he did not appoint, suggest, recommend or concur in the appointment of any of the respondents, and that he did not fix, suggest, recommend or concur in the amount of compensation fixed for each or any of the respondents."

The Court, however, declined to accept this purely ministerial view of his functions and responsibility in the matter. Rule 12 states that "each head of a department shall, in addition to all other requirements, bring to the attention of the appropriate committee all matters connected with his department," and the court held that this was sufficient to give him the right and duty to protest against the payroll padding. As to the rule requiring the head of the department to certify and approve the lists or payrolls, it said: "What was the purpose of the requirement? . . . It surely had some significance. It must have meant more than a mere means of apprising the warrant clerk that the record showed the appointment of these assistant attorneys. Such information could have been gleaned from the records themselves. If it was not the purpose of such rule that the attorney's certificate be taken as evidence that the head of the legal department knew and approved the fact that the named attorneys were carried on the payrolls as members of his department, what, then, could have been the purpose of that rule? The head of this department knew better than anyone else as to who on those rolls or lists was needed and who was not. No purpose is seen in the requirements of the rule that he certify the lists if his so doing was merely the act of an automaton.

The remainder of the opinion is devoted to a rather full consideration of the argument of this respondent that he "could have been compelled by mandamus to remain in office and to approve the payroll at the will of the trustees, and if his acts did dovetail with or contribute to the waste of public funds such acts were merely clerical and render him in no way responsible." In support of that view counsel for respondent had cited People vs. Williams (145 Ill., 573) in which it was said that "it is held in numerous English cases that by the common law it was the duty of every person having the requisite qualification, elected or appointed to a public municipal office, to accept the same, and that a refusal to accept such office was punishable at common law." The Court, however, called attention to the fact that the offices affected by the rule in the English cases were those attended by onerous burdens without appreciable compensation. It continued:

"It is by no means clear what rules of the English common law relating to the punishment for crime exist in Illinois today independent of statute. In Johnson vs. People, 22 Ill., 314, it was held that provisions of the Criminal Code relating to punishment for offenses not therein enumerated applied to acts which were offenses at common law. Only those acts deemed criminal under the common law as it existed prior to the fourth year of James the first (1604) are, in the absence of statute so providing, subject to punishment in Illinois. Counsel have referred to no American case, and we have found none, in which it has been held that in the absence of any applicable statute, criminal penalty for failure or refusal to serve in public office may be inflicted. Assuming that courts are to look to the English common law for the power to compel the discharge of official duties or to punish refusal so to do, it is apparent that the application of that power is to be limited to cases lying within the reason for its existence as shown by the old English cases. The office of attorney for the Sanitary District of Chicago, with its substantial remuneration, can hardly be said to be an onerous duty of citizenship which may not, in the absence of statute, be avoided at will." And further on: "While it may not be doubted that the legislature has the power to impose a penalty for refusal to perform the duties of an office such as here involved, no such statute has been enacted in this State. . . . Respondent, while filling the office, could doubtless be required to carry out the lawful orders of the board, but this affords no basis for saying that he may be compelled by mandamus to do that which effectuated an illegal act of his superiors. The reason for the ancient common law rule as to burdensome offices of the town or parish does not exist in this case, and it may well be urged that no such rule should be applied to compel continuance in offices carrying large emoluments, in the absence of proof of injury to the public service by the resignation of the officer. It may be further observed that it is to be doubted whether the courts could by mandamus require that an officer perform an official act demonstrably against the public interest. It seems certain that they would not do so."

The head of the department and certain other respondents asked for a rehearing, which was denied Feb. 23, 1933. The Court did, however, change its opinion as originally handed down so as to reduce the suspension periods of various respondents. This digest embodies the final changes.

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A SIGNIFICANT DECISION

The movement for the passage of Declaratory Judgment Acts in State and Nation should receive a decided impetus from the decision of the Supreme Court of the United States in the case of Nashville, Chattanooga and St. Louis Railway vs. Wallace, which is reviewed in this issue. In that case the Supreme Court assumed jurisdiction to review an appeal from a final judgment rendered by the Supreme Court of Tennessee, brought under the Declaratory Judgment Act of that State, and involving a question of constitutional right.

The procedure authorized by the Tennessee statute, as a footnote to the opinion by Mr. Justice Stone states, has been extensively adopted both in this country and abroad. In fact, the same or similar procedure is now authorized in twenty-nine American States and has arisen in response to an insistent demand for preventive justice. It is therefore evident that the decision, which recognizes the adoption of new methods of procedure as the business of the States, and which definitely outlines the sort of causes arising under the declaratory method which the court holds itself constitutionally empowered to review, is of wide interest and importance.

There have been various statements by the Court in fairly recent cases disclaiming the power to render a purely declaratory judgment. It is now evident of course that the statement had nothing to do with the question of declaratory procedure as such, but referred to such proceedings as in the Court's opinion did not involve a "case" or "controversy" in the constitutional sense. In the Tennessee case it found that all the elements of a case or controversy were present, that the appeal was from a final determination of the rights of all parties at interest by the highest court of the State, and that a Federal question was involved. It therefore proceeded to review it and rendered a decision affirming the decision of the State Supreme Court.

The Court does not regard the label which the Legislature has attached to the proceeding as of special significance or as determinative of the jurisdictional question in any way. It looks beyond the mere word "declaratory" to the facts involved, and it notes that "the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin the collection of the tax." It brushes aside the idea that process or execution to carry a judgment into effect is an indispensable adjunct to the exercise of the judicial function. Most important of all for the twenty-nine jurisdictions in which the "declaratory judgments" legislation has been passed, it says that the Constitution does not require "that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies." On this point it continues:

"The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a State Court, the ultimate constitutional purpose is the protection by the exercise of the judicial function of rights rising under the Constitution and laws of the United States. The States are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the State Courts are not enough to preclude review of the adjudication by this court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below."

The whole question of the power to review of course turned on the meaning assigned to the words "case" or "controversy,"

as used in the Constitution. And in deciding that the Tennessee appeal, though based on a proceeding for a "declaratory judgment" as defined by the statute of the State, presented such a case, the Court was careful to distinguish it from a number of other cases in which it had held that no case or controversy existed. For instance, the appellant was "not attempting to secure an abstract definition by the Court of the validity of a statute," as in Muskrat vs. United States, or "a decision advising what the law would be in an uncertain or hypothetical state of facts," as was "thought" to be the case in Liberty Warehouse Co. vs. Grannis and several other cases which loom large in the literature on the subject of declaratory judgments. For the other distinctions made as to previous decisions the reader is referred to the opinion. A criticism of the distinctions in three of the most important of these cases may be found in an article on "The Supreme Court and Declaratory Judgments" by Edwin M. Borchard in the December, 1928, issue of the JOURNAL.

An extract from the same article seems to anticipate the situation which confronted the U. S. Supreme Court when the Tennessee case was presented. Commenting on the statement in the opinion in the second Liberty Warehouse case that "This court has no jurisdiction to review a mere declaration judgment," he says: "Would it really be possible for the United States Supreme Court to refuse to pass upon the constitutionality of a State statute or upon any other issue involving a Federal right, if the case had been begun in the State court under declaratory judgment procedure? Adherence to such a position might make the decision of a State Court on a federal constitutional question final. Could it present a justiciable federal question if begun by injunction, but no justiciable federal question if begun by declaratory action? In view of the fact that twenty-three states have now adopted declaratory judgment procedure, it would seem highly probable that the question will be squarely presented at some time. . . ."

The court has given its answer to the question. It is partly based on the terms of the Tennessee Statute, which follows the Declaratory Judgments Act of the Conference of Commissioners on Uniform State Laws, and partly on the fact that the statute has often been construed by the Tennessee Supreme Court, "which has consistently held that its provisions may only be invoked where the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy to which he is a party, capable of final adjudication by the judgment or decree to be rendered." Situations parallel to that in Tennessee are doubtless to be found in most of the other jurisdictions having a Declaratory Judgment Act. This decision should give great encouragement to the movement for the enlargement of the field of usefulness of the judicial institution so that it may no longer be necessary to postpone the application for the determination of a controverted question until damage has resulted and a more timely remedy by an adjudication which shall precede and prevent the injury may be insured.

AMERICAN BAR RADIO PROGRAMS ATTRACT ATTENTION

THE radio programs presented by the American Bar Association over the Columbia Broadcasting System in cooperation with the National Advisory Counsel on Radio in Education continue to attract a large amount of interest from the profession and the public.

Questions have come in from all parts of the country and while the most enthusiastic comments which have been received are from lawyers, it is apparent that there is a large group of the public who are tuning in regularly on the series.

During the month of April the following speeches are scheduled on the dates given from 6 to 6:30 P. M. Eastern Standard Time:

April 2—What Is the Bar Doing to Improve the Administration of Justice? by Guy A. Thompson, former President of the American Bar Association.

April 9—Reforming the Law Through Legislation, by Henry W. Toll, Managing Director of the American Legislators' Association, and Professor Edson R. Sunderland of the University of Michigan.

April 16—Hurdles in the Path of a Candidate for Admission to the Bar, A Round Table Discussion, by Philip J. Wickser, Secretary of the New York Board of Law Examiners, Theodore Francis Green, Governor of Rhode Island, and Robert T. McCracken, Chairman of the Philadelphia County Board of Law Examiners.

April 23—The Lawyer Looks At His Responsibilities, by Newton D. Baker, former Secretary of War, President of the American Judicature Society.

On April 30 a program will be given from 6-6:30 P. M. Eastern Daylight Saving Time.

April 30—How the Law Functions, by Professor Karl N. Llewellyn, of the Columbia University Law School, Professor Walter Wheeler Cook, of the Institute of Law of Johns Hopkins University, and Jerome Frank, of the Yale Law School.

REVIEW OF RECENT SUPREME COURT DECISIONS

Right of Federal Court in Bankruptcy Case to Bar State Claim for Taxes Not Presented Within Period Prescribed for Proof—Federal Court Sitting in One State May, in Its Discretion, Decline to Take Jurisdiction of Case Requiring Determination of Questions Relating to Management of Internal Affairs of Corporation Organized under Laws of Another State—Fourteenth Amendment and State Practice on Appeal to Correct Erroneous Judgment—Court's Power to Impose Sentence after Temporary or Permanent Suspension—Formal and Informal Signatures to Bills of Exception—Jurisdiction to Review Decree under State Declaratory Judgment Act

By Edgar Bronson Tolman*

Bankruptcy—Priority of State Taxes—Barring Claims for Taxes

A federal court in bankruptcy may by order bar the claims of a state for taxes against a bankrupt, if the state fails to make proof of its claims within the period prescribed for presenting such proof.

New York v. Irving Trust Co. Adv., Op. 499; Sup. Ct. Rep. Vol. 53, p. 389; Am. B. R. (N. S.) 286.

In this case the Experimenter Publishing Company was adjudicated bankrupt March 6, 1929. Thereafter, on July 1, 1929, the referee by order directed that "proof of any and all claims which the State of New York may have against the estate" of the bankrupt should be filed within 60 days after service of the order. The order was served July 18, 1929.

October 20, 1929, the State filed notice of a possible demand for additional franchise taxes for 1917 to 1929, stating that definite claims therefor would be presented when necessary reports could be obtained. No further proof followed.

On March 30, 1931, the referee, on petition of the trustee, ordered the notice of October 20th stricken from his files, and held that the claim for taxes could not be filed after the expiration of the time fixed in the order. The district court approved this, and the circuit court of appeals affirmed the judgment, but without prejudice to an application by the State presenting an actual claim which can be audited, and showing why it should be paid, at which time the trustee might also contest the claim.

On certiorari the only question considered in the Court's opinion, by Mr. Justice McReynolds, was the power of the district court to grant the motion to expunge. Sustaining this power, Mr. Justice McReynolds pointed out that the orderly and expeditious settlement of bankrupt estates is a fundamental purpose of the Bankruptcy Act, and that to accomplish that purpose bar orders are necessary in regard to claims by a state.

> The extant Bankruptcy Act—Section 2—declares the United States District Courts shall be courts of bankruptcy and undertakes to give them jurisdiction to adjudge persons bankrupt; to allow or disallow claims; to take charge of the property of bankrupts; to cause their estates to be collected, reduced to money and distributed; to determine controversies in relation thereto; to close estates when fully administered; and make such general orders as may be necessary for enforcement of the Act. Section 64 requires payment of taxes due to the United States, state, county, district or municipality in advance of dividends to creditors. Section 57, (n), provides that claims shall not be proved after six months subsequent to adjudication. Act May 27, 1926, c. 406, Sec. 13, 44 Stat. 666.
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> It is admitted here, that as the United States and the States are not mentioned in the limitation of Section 57, they are not bound thereby. The consequent necessity for bar orders is apparent. Otherwise, estates could not be promptly closed. * *
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> The Federal government possesses supreme power in respect of bankruptcies. . . If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated.

The case was argued by Mr. Robert P. Beyer for the petitioner, and by Mr. S. John Block for the respondent.

Conflict of Laws—Federal Courts—Determination of Questions of Law Affecting Foreign Corporations

A federal court sitting in one state may, in the exercise of its sound discretion, decline to take jurisdiction of a case requiring a determination of questions relating to the management of the internal affairs of a corporation organized under the laws of another state, particularly where the questions involve the interpretation of statutes of the state of corporate domicile which have not been construed by the courts of the latter state.

Rogers v. Guaranty Trust Co. of New York, et al., Adv. Op. 382; Sup. Ct. Rep. Vol. 53, p. 295.

The opinion of the Court in this case discussed the jurisdiction of a district court to adjudicate a controversy relating to the corporate management and affairs of a corporation foreign to the state in which the district court is sitting, and the court's discretion to decline to exercise its jurisdiction. The petitioner brought two suits in a state court in New York, one against The American Tobacco Company, a New Jersey corporation licensed to do business in New York, and against some of its directors, and the other against the Guaranty Trust Company, Junius Parker and others, attacking the validity of an allotment and sale of stock of the tobacco company in accordance with a certain plan. On application of the defendants the suits were removed to the federal district court sitting in the Southern District of New York.

The board of directors of the tobacco company, in

*Assisted by James L. Homire.

June, 1930, adopted a resolution recommending the reduction by one-half of the par value and the doubling of the number of shares of its common stock and common stock B. By another resolution the directors advised approval by the stockholders of a plan for the issue and sale of common stock B to employees pursuant to c. 175, New Jersey Laws, 1920. The plan submitted accorded to such employees and others actively engaged in the conduct of the business as may be selected an opportunity to purchase stock "by way of additional compensation for services to be rendered," and allotted for subscription shares of unissued stock. The plan permitted the board to offer stock to such persons in the service at prices not less than par, and upon other terms and conditions determined by the president. It provided that no employee or person actively engaged in the conduct of the business of the corporation or its subsidiaries should be deemed ineligible to its benefits by reason of being also a director or officer of the corporation or its subsidiaries.

The stockholders adopted the plan in July, 1930, and the board in January, 1931, authorized a sale of 56,712 shares of common stock B at par value of $25 per share. The plan recommended that the basis of distribution should be the number of shares having a par value equal to 1/3 of that year's compensation to each allottee rated at 100% and correspondingly less to those having lower ratings, the ratings being determined on the basis of services rendered, their value, and the total compensation received by each allottee during 1930. Each of 535 employees, including directors and officers, was accorded the right to subscribe under the plan. All shares allotted were sold to the trust company at $25, par value, and each allottee was permitted to subscribe at the same price, the stock to be additional compensation for 1931, but not to be taken up until the end of that year. At that time the stock was worth $112 per share.

The complainant challenged the transaction upon the following grounds: That the directors were disqualified by reason of their interest as allottees, and the plan was not passed by valid vote or adopted as required by c. 175; that the subsequent vote of the stockholders was invalid, being predicated on an invalid resolution of the directors; that the plan was *ultra vires* in allotting shares as additional compensation for services to be rendered; that under the company's charter and under the statutes every stockholder had the right to have a pro rata distribution of the stock according to the number of his shares.

The defenses set up were: that the plaintiff failed to comply with Equity Rule 27; the stockholders including the plaintiff had ratified the allotments to the directors; the suit was an attempt to regulate a corporation foreign to New York, and the federal court sitting therein should decline to take jurisdiction; the allotments were fair and reasonable and according to the corporate by-laws and the New Jersey laws.

The district court dismissed the bills of complaint without prejudice to the plaintiff's right in the courts of New Jersey, upon the ground that the case involved complex questions relating to internal corporate affairs as governed by New Jersey laws on which there were no New Jersey decisions to guide the federal court. The circuit court of appeals, by divided bench, considered the merits, found the plan authorized and the stock lawfully issued under the New Jersey statute, and directed dismissal of the complaint. One judge of the circuit court dissented.

On certiorari the Supreme Court by a divided bench upheld the decree of the district court, and held that the dismissal of the complaints should be without prejudice. MR. JUSTICE BUTLER delivered the majority opinion, and stated that while the district court had jurisdiction it could, in the exercise of a sound discretion, refrain from exercising it and remit the plaintiff to a more appropriate forum.

> The authorization, allotment and sale of the shares in question involved the proportionate ownership of stockholders and their rights *inter sese*. Unquestionably the steps taken and proposed to formulate and carry out the plan constitute the conduct and management of the internal affairs of the tobacco company. The controversy is solely between the plaintiff and other stockholders not participating in the distribution on one side and the purchasers of the new stock, the corporation, its directors and officers on the other. When, by acquisition of his stock, plaintiff became a member of the corporation he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of New Jersey law.
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> It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile. . . While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. . . . It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate the plaintiff to an appropriate forum. . . Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case.

As bearing on the propriety of not taking jurisdiction here, MR. JUSTICE BUTLER pointed out that the constitutional validity of c. 175 was drawn in question as well as its true meaning and intent, which has never been passed upon by the state courts of New Jersey.

> The determination of plaintiff's contentions requires not only the ascertainment of the true meaning and intent of c. 175 of New Jersey Laws, 1920, but also its constitutional validity. Its provisions have never been construed by the New Jersey courts and they or their like are not familiar in the statute law governing corporations organized in other States. And other New Jersey statutes among which are c. 195, Laws of 1917, and c. 318, §16, Laws of 1926, are claimed by plaintiff to have an important bearing upon this case. But the courts of that State have had no occasion to consider the interrelation, if any, between them and c. 175 pursuant to which the stock in question purports to have been issued to employees. A mere inspection of the New Jersey statutes directly involved suggests grave doubts as to their proper application to the facts in this case and the difference of opinion expressed below confirms that impression.
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> So far as concerns the cancelation of the allotted shares and other relief sought by plaintiff the situs of the stock is in New Jersey and all questions relating to the validity of the plan, authorization, issue, allotment and sale of the same may be conveniently and effectively determined in New Jersey courts, the authoritative and final interpreters of the statutes of that State. A proceeding *in rem* is authorized, process therein may be served by publication and a decree, final and binding upon all, canceling or sustaining the stock may readily be enforced. . . The facts and circumstances disclosed by the record clearly bring this case within the general rule and abundantly justify the exercise of discretion on the part of the district court in dismissing the bills

of complaint without prejudice. As the Circuit Court of Appeals considered and decided the merits of the case, its judgment is reversed, the judgment of the district court entered upon its mandate is vacated and the case will be remanded to the district court with directions to reinstate the earlier judgment dismissing the bills of complaint without prejudice.

MR. JUSTICE STONE and MR. JUSTICE CARDOZO delivered dissenting opinions. In his opinion MR. JUSTICE STONE expressed the view that the Court should decide the case on the merits in favor of the petitioner. In it he developed the details of the transaction as disclosed by the record. In this connection he called attention to the fact that the board of directors included as members the president of the corporation, five vice-presidents and a secretary and a treasurer; that unknown to the stockholders, the president, in 1930, received a profit sharing bonus in addition to his fixed salary of $168,000 giving him a total compensation for the year of over $1,010,000 which was further augmented by a special "credit" of $273,470; that four of the five vice-presidents received an aggregate annual salary and bonus of more than $2,077,000 also unknown to the stockholders. In addition to that they had benefited by other stock subscription plans. Of the 56,712 shares of unissued common stock B under the challenged plan 32,370 were allotted to directors including 13,440 allotted to the president. The remainder was allotted in small amounts to 525 employees.

Urging that the case should be decided on its merits MR. JUSTICE STONE stated as to the legality of the issue that there had been no "plan" formulated and presented for the stockholders as contemplated by the statute. He added, however, that even if the proposal be regarded as a formulated plan, it did not discharge the directors from other fiduciary duties which remained to be considered.

> The respondents stand in no better position, even if we assume that the proposal submitted to the stockholders was a formulated plan, within the meaning of the New Jersey statute. For in that case, authority for the directors' action must be found in the stockholders' approval of the proposal which they submitted, and we must interpret the proposal and the action taken by the stockholders in terms of their legitimate expectation that the directors were complying with their duty as fiduciaries and not dealing with them at arm's length. They were entitled to read the proposal in the light of the fundamental duty of directors to derive no profit from their own official action, without the consent of the stockholders, obtained after full and fair revelation of every circumstance which might reasonably influence them to withhold their consent. . . . They were entitled to assume that the proposal involved nothing which did not fairly appear on its face and above all that it was not a cloak for a scheme by which the directors were to enrich themselves in great amounts at the expense of the corporation, of whose interests they were the legal guardians.

The statement in the proposal submitted to the stockholders that no person should be "deemed ineligible to the benefits of the plan" by reason of being an officer or director was also commented on as insufficient to give warning to the stockholders of the benefits to accrue to the officers and certain directors.

Urging the propriety of taking jurisdiction Mr. Justice Stone said:

> I cannot agree that a proper exercise of discretion requires us to deny to the petitioner the relief to which he is so clearly entitled. This is the first time that this Court has held that a federal court should decline to hear a case on the ground that it concerns the internal affairs of a corporation foreign to the state in which it sits. We may assume, without deciding, that neither a federal nor a state court of equity will, as a general rule, undertake to administer the internal affairs of a foreign corporation. But the case before us is, in this respect, unlike a suit to dissolve the corporation and wind up its affairs; . . . or compel the declaration of a dividend, . . or interfere with the election of officers or the meetings of shareholders or directors. . .
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> We are presented with no problem of administration. The only relief which the petitioner merits on the record before us or which he asks here is a decree that certain directors, now before the Court, restore to the treasury of the corporation, also before the Court, certain shares of stock alleged to have been illegally issued to them, and that certificates for the stock now in possession of the trustees, who are likewise before the Court, be surrendered. There are no more obstacles to the rendition of an effective decree than in any other case in which a stockholder seeks reparation for depredations upon the corporate property committed by directors, some of whom only are before the Court. . . . The decree will be completely satisfied by delivery of the certificates, properly endorsed, to the corporation. There is and can be no suggestion that such a decree cannot be pronounced and enforced as effectively by the courts in New York as it could be by those in New Jersey.
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> I come then to the only ground which can plausibly be urged for declining the jurisdiction—that in one, but not necessarily a conclusive aspect of the case, the Court may be called on to decide questions of New Jersey law which, although novel, can hardly be said to be complicated or difficult. If there were any principle of federal jurisprudence, generally applicable, that in cases between private parties federal courts of equity may, in their discretion, decline jurisdiction because called upon to decide an unsettled question of state law, I would willingly acquiesce in declining it here. But this Court has not declared such a principle and does not recognize it now. On the contrary, whether jurisdiction rests on diversity of citizenship or on a substantial federal question, this Court has consistently ruled that it is the duty of a federal court of original jurisdiction, and of this Court on appeal from its decree, to pass on any state question necessarily involved, however novel, and that the decision may be rested on that ground alone.
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> If federal courts are to continue the general practice of deciding novel questions of state law whenever there are necessary or convenient grounds for the disposition of cases pending before them, there are peculiarly cogent reasons why there should be no departure from the practice in cases like the present. While a corporation in legal theory has only one domicile, in practice its activities are often nation-wide and the legal domicile of the corporation, as in this case, is neither the place of its real corporate life nor the home of its officers and directors. Hence, if stockholders' suits, such as the present, are to be maintained with any hope of success, the practical necessities of making parties, securing evidence, obtaining the production of documents and relief by injunction against individual wrongdoers, justify, if they do not compel, their prosecution in the particular jurisdiction where necessary parties and witnesses may be found, rather than in the place of the technical corporate domicile.

MR. JUSTICE CARDOZO, in his opinion, stated that he could find no adequate reason for declining to take jurisdiction, so far as the suit was one to recover from the directors shares received in breach of their fiduciary duties.

> Viewing the suit as one to reclaim the shares received by the directors in breach of their fiduciary duties to the corporation and the shareholders, I find no adequate reason for the refusal to exercise jurisdiction, and this though a different conclusion might be thought to be necessary if relief were to be given upon grounds affecting the validity of the issue as a whole.
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> In the circumstances of this case, the certificates allotted to the directors may be charged with a constructive trust, and surrendered to the corporation to be held in its treasury, without impeaching a single certificate other than their own.
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> *
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> I leave the question open whether in other circumstances or with other consequences there may be a cancellation of the shares of a foreign corporation in the absence of an adjudication by the courts of the domicile. Here the organic structure of the corporation, if affected by the decree

at all, will not be changed in such a way as to work substantial detriment to any stranger to the suit, but the fruits of an unjust enrichment will be put back into the treasury. I think we are at liberty to do so much, if nothing more, without waiting upon the judgment of any other court.

The doctrine of *forum non conveniens* is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused. At least that must be so when the wrong is clearly proved. The overmastering necessity of rebuking fraud or breach of trust will outweigh competing policies and shift the balance of convenience. Equity, it is said, will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle, and inaction may confirm, the purpose of the wrongdoer.

MR. JUSTICE BRANDEIS concurred with MR. JUSTICE STONE. MR. JUSTICE CARDOZO also agreed with MR. STONE that a breach of fiduciary duties by the directors was a legitimate inference from the bill, and that the cause should be remanded to the district court for determination on the merits.

MR. JUSTICE ROBERTS did not participate in the consideration or decision of the case.

The case was argued by Mr. Richard Reid Rogers for the petitioner and by Mr. John W. Davis for the respondents.

Constitutional Law—The Fourteenth Amendment —Due Process—Res Judicata

Where the state practice provides the remedy of appeal to correct an erroneous judgment, and limits the issue on a motion to vacate such judgment to the question of the trial court's jurisdiction to enter such erroneous judgment, there is no violation of due process of law under the Fourteenth Amendment in the State Supreme Court's refusal to determine the merits of the controversy on appeal from an order entered on such motion to vacate.

Under the full faith and credit clause a Federal Court will not enjoin enforcement of the judgment of a State Court, where the questions sought to be raised in the Federal Court might have been but were not seasonably raised in the state court, since the latter's judgment constitutes res judicata as to such issues.

Federal questions which might have been raised at the trial but are raised for the first time by the petition for a rehearing in the State Supreme Court cannot be considered on a proceeding in the Federal Court to enjoin the enforcement of the judgment of the State Court.

American Surety Co. v. Baldwin, Adv.. Op. 125; Sup. Ct., Rep. Vol. 53, p. 98.

In this opinion, delivered by MR. JUSTICE BRANDEIS, the Court disposed of two cases relating to a judgment entered against the American Surety Company. One case, No. 3, came before the Court on certiorari to review a judgment of the Supreme Court of Idaho; the other, No. 21, on certiorari to review a decree of the Circuit Court of Appeals for the Ninth Circuit reversing a decree of a federal district court denying the Surety Company's application to enjoin enforcement of the judgment. In both cases the Surety Company sought to be relieved of a judgment against it, on a supersedeas bond, in favor of the Baldwins, claiming that the judgment was void under the due process clause of the Fourteenth Amendment.

The bond was given on the appeal of the Singer Sewing Machine Company and one Anderson, its employee, to the Idaho Supreme Court from a judgment for $19,500 recovered against them by the Baldwins in a trial court of Idaho for damages in an automobile collision. The defendants gave a joint notice of appeal "from that certain judgment . . . against the defendants and each of them, and from the whole thereof." Two bonds were given by the Surety Company, executed solely by it. One was for costs, and the other the supersedeas bond on which the challenged judgment was entered. It recited that "if the said judgment appealed from or any part thereof, be affirmed" and "if the said appellant does not make such payment within thirty days from the filing of the remittitur from the Supreme Court in the Court from which the appeal is taken, judgment may be entered on motion of the respondents in their favor against the undersigned party."

The State Supreme Court affirmed the judgment as to Anderson and reversed it as to the Singer Company. On filing the remittitur the appropriate new judgment against Anderson was entered in the trial court. It remained unpaid for more than thirty days, and the Baldwins, without notice to the original defendants or to the Surety Company, moved the trial court for judgment against the Surety Company, and judgment was entered accordingly.

The Surety Company conceded that by executing the bond it became a party to the litigation; and that if the effect of the bond was to stay the judgment against Anderson, consent had been given thereby to the entry of judgment without notice and the judgment would be unassailable. It contended, however, that, properly construed, the bond did not stay the judgment against Anderson, but solely as against the Singer Company; that hence it had not consented to the entry of judgment on Anderson's failure to pay; and that the judgment against it entered without notice and opportunity of a hearing on the construction of the bond, was void because violative of the requirements of due process. In deciding the cases MR. JUSTICE BRANDEIS stated that the judgment in No. 3 was affirmed for failure of the Surety Company to make seasonably the federal claim. It was pointed out that the Surety Company had moved to vacate the judgment, urging only state grounds, and that when the State Supreme Court reversed the trial court's order vacating the judgment, it had done so upon the ground that the only issue before the court on the motion to vacate was whether it had jurisdiction to enter the judgment on the bond. If that judgment was the result of erroneous construction of the bond, the remedy was by appeal, not by motion to vacate it.

The Surety Company petitioned for rehearing in the State Supreme Court, and then for the first time urged its contention that the rendition of the judgment violated the Fourteenth Amendment. This was thought insufficient to serve as the basis of review of the federal claim.

> The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. . . . This is not a case where, . . . the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court . . . Nor is the federal claim based . . . upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution.

The Court held that the federal district court's decree denying an application for an interlocutory in-

junction and dismissing the bill was right, because the federal remedy was barred by the proceedings in the state court which had ripened into a final judgment constituting *res judicata*.

> The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment. . . And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. . . But an adequate state remedy was available; and having invoked that and pursued it to final judgment, the Surety Company cannot escape the effect of the adjudication there.

MR. JUSTICE BRANDEIS pointed out that the State Supreme Court had jurisdiction over the parties and subject matter in order to determine whether the trial court had jurisdiction, and, as it might properly do, had narrowed the issue, on the motion to vacate and on the appeal from the order thereon, to the question of the trial court's jurisdiction, leaving the question of liability under the bond, properly construed, to an appeal from the judgment.

Holding that, under the facts disclosed, the full faith and credit clause required that the state judgment be recognized as *res judicata*, MR. JUSTICE BRANDEIS said:

> The full faith and credit clause, together with the legislation pursuant thereto, applies to judicial preceedings of a state court drawn in question in an independent proceeding in the federal courts. . . The principles of *res judicata* apply to questions of jurisdiction as well as to other issues. . . . They are given effect even where the proceeding in the federal court is to enjoin the enforcement of a state judgment, if the issue was made and open to litigation in the original action, or was determined in an independent proceeding in the state courts. . . The principles of *res judicata* may apply, although the proceeding was begun by motion. Thus, a decision in a proceeding begun by motion to set aside a judgment for want of jurisdiction is, under Idaho law, *res judicata*, and precludes a suit to enjoin enforcement of the judgment. . . Since the decision would formally constitute *res judicata* in the courts of the state; since it in fact satisfies the requirements of prior adjudication; and since the constitutional issue as to jurisdiction might have been presented to the state Supreme Court and reviewed here, the decision is a bar to the present suit in so far as it seeks to enjoin the enforcement of the judgment for want of jurisdiction.

In conclusion the Court dealt with the Surety Company's contention that the judgment was void even if the trial court had jurisdiction, because it had been entered without notice and opportunity for a hearing on the construction of the bond, and therefore lacked due process. In answer to that contention the Court observed that if the bond, properly construed stayed the judgment against Anderson, the Surety Company had consented to the entry of judgment without notice, on his failure to pay; that if it did not stay the judgment against Anderson, the Surety Company had an opportunity for hearing on the meaning of the bond by appealing from the judgment.

Holding that the state procedure was constitutional the Court said:

> Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. . . An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law. We need not enquire whether its validity may not rest also on the ground that the Surety Company, by giving the bond, must be taken to have consented to the State procedure. . . The opportunity afforded by state practice was lost because the Surety Company inadvertently pursued the wrong procedure in the state courts. Instead of moving to vacate, it should have appealed directly to the state Supreme Court. When later it pursued the proper course the time for appealing had elapsed. The fact that its opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied. . . Having invoked the state procedure which afforded the opportunity of raising the issue of lack of notice, the Surety Company cannot utilize the same issue as a basis for relief in the federal court. Federal claims are not to be prosecuted piecemeal in state and federal courts, whether the attempt to do so springs from a failure seasonably to adduce relevant facts . . . or from a failure seasonably to pursue the appropriate state remedy.

The case was argued by Mr. William Marshall Bullitt and Mr. Allan C. Rowe for the Surety Company and by Mr. James F. Ailshie, Jr. for the Baldwins.

Criminal Law—Procedure

Suspension of sentence, whether temporary or permanent, does not deprive the court of power to impose sentence at a subsequent term.

Miller v. Aderhold, Adv. Op. 491; Sup. Ct. Rep. Vol. 53, p. 325.

The petitioner in this case was convicted in the federal district court for the Southern District of New York on his plea of guilty to the crime of stealing from the United States mails. By order of the court, sentence was suspended, and the petitioner was discharged from custody.

At a later term of court the petitioner was sentenced by another judge to four years imprisonment. After a motion to vacate sentence had been denied the petitioner filed a petition for a writ of *habeas corpus* in a federal court in Georgia. The district court dismissed the petition, and the circuit court of appeals affirmed the judgment.

On certiorari the Supreme Court affirmed the judgment in an opinion by MR. JUSTICE SUTHERLAND. Stating the contentions of the parties, he said:

> Petitioner seeks a reversal here on the ground that the order of December 10 constitutes a permanent suspension of sentence, void under the decision of this court in *Ex parte United States*, 242 U. S. 27; and that with the expiration of the term the trial court was without power to sentence petitioner. The Solicitor General vigorously opposes the contention that the effect of the order was to suspend sentence permanently; but, without determining that question, we are of opinion that if such was the effect, nevertheless, the court was not deprived of power to impose sentence at a subsequent term.

Recognizing that there are conflicting decisions on the point, and that the greater number support the petitioner's contention, the Court found that the weight of reason is against such contention. The Court pointed out that though it is not doubted that a permanent suspension of sentence is void, it does not follow that the court lost jurisdiction with the passing of the term. If the defendant suffers hardship from the suspended sentence he may put an end to it by asking the court to pronounce judgment.

In conclusion MR. JUSTICE SUTHERLAND said:

> In a criminal case final judgment means sentence; and a void order purporting permanently to suspend sentence is neither a final nor a valid judgment . . . If the suspension be for a fixed time, the case undoubtedly remains on the docket of the court until disposed of by final judgment. There is no good reason, in our opinion, why a different rule should obtain where the order of suspension, though expressly made permanent, is void. Such an order is a mere nullity without force or effect, as though no order at all had been made; and the case necessarily remains pending until lawfully disposed of by sentence. . .
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> The order here under review being ineffectual to confer immunity from punishment, the conclusion that such im-

munity existed must rest upon the bare fact that, without any saving provision, the term at which the accused was convicted but not sentenced had passed. But that foundation for the conclusion at once vanishes in the face of the rule that where judgment has not been prounounced upon a verdict during the term at which it was rendered, the cause continues on the docket and necessarily passes over to a succeeding term for final judgment or other appropriate action. . . . We conclude, in accordance with what we regard as the better view, that in a criminal case, where verdict has been duly returned, the jurisdiction of the trial court, under circumstances such as are here disclosed, is not exhausted until sentence is pronounced, either at the same or a succeeding term.

The case was argued by Mr. Dean G. Acheson for the petitioner, and by Mr. Paul D. Miller for the respondent.

Practice in Federal Courts—Bills of Exceptions—Signature of Judge

In signing a bill of exceptions the better practice is that a bill of exceptions should be authenticated by the formal signature of the judge of the court in which the cause was tried, but an informal signature by initials only is not a nullity, and the appellate court should consider the bill of exceptions on its merits, or else permit the bill of exceptions to be returned for a more formal signature.

Ohl & Co. vs. Smith Iron Works, Adv. Op. 485; Sup. Ct. Rep. Vol. 53, p. 340.

This opinion dealt with two cases, both of which were actions at law in which the respondent obtained judgments. Judge James A. Lowell, who presided at the trial, endorsed what purported to be a bill of exceptions in the following manner: "Allowed August 20, 1930, J. A. L., D. J." The Circuit Court of Appeals affirmed the judgments on the sole ground that the bills of exceptions were not sufficiently authenticated, and that, since the District Court had lost jurisdiction through expiration of the term, the records on appeal should not be returned for amendment.

On certiorari the judgments were reserved, with an opinion by MR. CHIEF JUSTICE HUGHES, and remanded to the Circuit Court of Appeals for hearing on the merits. The opinion stated that there was no doubt but that Judge Lowell affixed his initials to the bills of exceptions, intending thereby to authenticate them as allowed, and stated also that on the petitioner's application for rehearing Judge Lowell informed the Circuit Court that he had initialed them with that intention, and requested that they be returned to him for correction.

In disposing of the cases MR. CHIEF JUSTICE HUGHES called attention to the fact that the statute does not prescribe the form of signature, and stated that the cases which the Circuit Court of Appeals felt constrained to follow were not approved, to the extent that they imply that authentication in the manner under consideration made the bills of exceptions void, or precluded correction. While the practice of so signing bills of exceptions was disapproved, the informality of the signature was held not to render the bills of exception nullities.

> The statute contains no indication that the word "sign" is used in other than the ordinary sense. The statute gives neither definition nor qualification. Signature by initials has been held to be sufficient under the Statute of Frauds and the Statute of Wills and in other transactions. It has been held in some States that a different rule obtains in the case of the official signature of certain judicial officers, but the Congress has not established such a rule for the judges of the federal courts. Nor, in the absence of special statutory requirement, is there a uniform custom in relation to official signatures. It may be assumed that a requirement of the officer's signature, without more, means that he shall write his name or his distinctive appellation, but the question remains as to what writing of that character is to be deemed sufficient for the purpose of authenticating his official act. There is no rule that he shall adhere to the precise form of his name as it appears in his commission. The full name of the officer may or may not be used. Not infrequently christian names are omitted, in part or altogether, or are abbreviated or indicated by initials. In some of the most important communications on behalf of the Federal Government, only the surname of the officer is used. When an officer authenticates his official act by affixing his initials he does not entirely omit to use his name; he simply abbreviates it, he uses a combination of letters which are part of it. Undoubtedly that method is informal, but we think that it is clearly a method of "signing." It cannot be said in such a case that he has utterly failed to "sign," so that his authentication of his official act, in the absence of further statutory requirement, is to be regarded as absolutely void.
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> We do not approve the signing of bills of exceptions merely by the initials of the judge, but we regard the question as one of practice,—of regularity, not of validity. In the instant cases, the District Judge authenticated his allowance of the bills of exceptions by a form of signature easily and actually identified as his. No one was misled or injured. We perceive no reason why petitioner should lose its right to have the rulings upon the trial appropriately reviewed by the appellate court, merely because the District Judge failed to sign his full name. This is precisely the sort of defect which the Congress has provided shall not impair the substantial rights of the parties. 28 U. S. C. 391. At most, in the interest of a better practice, the bills of exceptions could have been returned for a more formal signature, but even that course was not necessary.

The case was argued by Mr. Lee M. Friedman for the petitioner, and by Mr. Martin Witte for the respondent.

Federal Courts—State Statutes—Jurisdiction to Review Decree Under State Declaratory Judgment Act—State Excise Taxes on Gasoline

A case or controversy within the judicial power of the Supreme Court is presented by an appeal from the judgment of a State Court in a suit under the State Declaratory Judgment Act, where the statute of the State authorizes such suit only in cases where the complainant asserts rights which are challenged by the defendant and presents an actual controversy to which the latter is a party, capable of final adjudication, and where no declaratory judgment may be rendered unless all persons who may be adversely affected by it are before the Court.

A State tax imposed on the storage and withdrawal of gasoline is not an unconstitutional burden on interstate commerce as applied to gasoline stored and withdrawn by an interstate rail carrier, when the tax is laid on a storage and withdrawal of the gasoline prior to its use in generating motive power in interstate railway operation.

Nashville, Chattanooga & St. Louis Ry. v. Wallace et al., Adv. Op. 444; Sup. Ct. Rep. Vol. 53, p. 345.

This case came before the Court on appeal from the Supreme Court of Tennessee which had affirmed a decree under the Declaratory Judgments Act of the State, upholding the validity of a state excise tax on the storage of gasoline. In setting the case down for argument the Court called the attention of counsel to the question whether the proceeding presented a case or controversy cognizable under the federal judicial power. This question was first dealt with and the Court, in an opinion by MR. JUSTICE STONE, unanimously held that the litigation presented a case within its appellate jurisdiction.

Pointing out that neither the legislative label nor the popular description of the judgment as "declaratory" is determinative of the question, MR. JUSTICE

STONE examined the nature of the proceeding and its effect on the appellant's rights.

The Tennessee Declaratory Judgments Act confers jurisdiction on courts of record "to declare rights . . . whether or not further relief is or could be claimed." The declaration may be affirmative or negative in form and effect "and such declaration shall have the force and effect of a final judgment or decree." It expressly provides for determination of rights under the statute by any person affected thereby.

Under the Act the court may refuse to render a declaratory judgment where, if rendered, it "would not terminate the uncertainty or controversy giving rise to the proceeding." Further relief may be granted in a case on the basis of the declaratory judgment or decree. Section 11 of the Act requires that all persons shall be made parties who have or claim any interest which would be affected by the declaration, and the rights of persons not made parties are not prejudiced by the declaration.

The Court also noted the construction placed upon the Act by the Tennessee Supreme Court which permits it to be invoked only where the complainant's claims are contested by the defendant, so that an actual controversy between the parties is presented.

> This statute has often been considered by the highest court of Tennessee, which has consistently held that its provisions may only be invoked when the complainant asserts rights which are challenged by the defendant, and presents for decision an actual controversy to which he is a party, capable of final adjudication by the judgment or decree to be rendered . . . It has also held that no judgment or decree will be rendered when all the parties who will be adversely affected by it are not before the Court.

The nature of the proceeding under review was then examined and it was found to be substantially like a suit to enjoin collection of the tax, the only differences being that there was no allegation of irreparable injury and no prayer for an injunction.

> Thus the narrow question presented for determination is whether the controversy before us, which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it in the state courts, without praying for an injunction or alleging that irreparable injury will result from the collection of the tax.

Holding that the Constitution does not require that a controversy shall be in the traditional form of procedure in order to be cognizable by the federal courts, and that the present proceeding was a case or controversy subject to review, MR. JUSTICE STONE said:

> The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. Whenever the judicial power is invoked to review a judgment of a state court, the ultimate constitutional purpose is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. The states are left free to regulate their own judicial procedure. Hence, changes merely in the form or method of procedure by which federal rights are brought to final adjudication in the state courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical controversy, which is finally determined by the judgment below . . . As the prayer for relief by injunction is not a necessary pre-requisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial. Such was the purport and effect of our decision in *Fidelity National Bank* v. *Swope*, (274 U. S. 123), where it was held that a final judgment rendered by a state court in an adversary proceeding brought under a state statute to determine the validity of liens about to be imposed for benefits assessed under a city improvement ordinance, presented a case within the appellate jurisdiction of this Court. Accordingly, we must consider the constitutional questions raised by the appeal.

In disposing of the merits of the case the Court upheld the validity of the challenged statute and rejected appellant's contentions that it imposed a tax on gasoline while still in interstate commerce, and that it was in effect a tax on the use of the gasoline in its business as an interstate carrier, and thus an unconstitutional burden on interstate commerce.

The first contention was rejected because,

> The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation.

The appellant's second contention was rejected upon the ground that the tax is an excise on the storage and withdrawal of the gasoline, and is a constitutional exaction, since its effect on interstate commerce is indirect and remote. As to this MR. JUSTICE STONE said:

> We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, subsequent to the incidence of the tax, as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power . . . and a tax levied upon the use of gasoline in generating motive power for a ferry boat used exclusively in interstate commerce has been held to be so direct and immediate a burden on the commerce itself as to be invalid. . .
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> But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its prospective use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock or other instruments of interstate commerce, which are subject to local property taxes . . . The power to tax property, the sum of all the rights and powers incident to ownership, necessarily includes the power to tax its constitutent elements. . . Hence, there can be no valid objection to the taxation of the exercise of any right or power incident to appellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce. . . Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interestate commerce itself to transgress constitutional limitations.

The case was argued by Mr. Fitzgerald Hall for the appellant, and by Messrs. W. F. Barry, Jr., and E. F. Hunt for the appellees.

Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

STATUTES REGULATING LIABILITY OF OWNER OR OPERATOR OF AUTOMOBILES FOR INJURY TO GUEST

Majority and Minority Rules Apart from Any Statutory Limitation of Liability—Holding of Courts on Legislative Action in Various States Defining Duty of Owner or Operator—Constitutionality of Guest Statutes Imposing Liability Only in Case of "Gross Negligence," etc., Upheld—Definition of Terms

By Hon. Sumner Kenner
Judge of Circuit Court, Huntington, Indiana

WITHOUT regard to any statutory duty, the majority rule may be stated as follows: That the driver of an automobile owes an invited guest the duty of exercising reasonable care in its operation so as not unreasonably to expose him to danger and injury by increasing the hazard of travel.[1]

On the other hand, the minority rule, sometimes called the Massachusetts rule, holds that gross negligence must be shown in order to hold the owner or operator of an automobile for an injury to an invited guest.[2]

In several of the States the legislatures have passed statutes limiting such liability, and in others entirely extinguishing any liability on the part of the owner or driver, and it is the purpose of this article to examine briefly these statutes, and the holdings of the several courts thereunder.

In 1927 a statute was passed in Oregon providing that any person who as a guest in any automobile sustains an injury shall have no right of recovery against the owner or driver. It was provided that an acceptance of a free ride as a guest shall be presumed to be a waiver of said guest of liability for accidental injury caused by the owner or driver of the car. In April, 1927, one Virginia M. Stewart was injured while riding as a guest and brought suit, and the lower court dismissed her case in view of the above statute. In reversing the case, the Supreme Court,[3] after calling attention to the provision of the Oregon constitution providing that every man shall have remedy by due course of law for injury done him in his person, said: "It is clear that the purpose of the act before us was to deprive a guest of redress in damages for an injury negligently inflicted upon him by his host if he was being transported without charge. The mere fact that the two did not intend that their legal rights should be such could not alter the situation; likewise the act fixes the above as their legal rights, regardless of the capacity of the parties to contract for themselves. Thus, for instance, a minor below the age of discretion is deprived of redress for an injury inflicted upon him through the negligence of the host; then also the host is freed from liability, even though his negligent act may have been induced by the excessive use of an intoxicant or other similar factor.

"The purpose of the act is thus clear; likewise, the constitutional provision needs no further elucidation. And, from the clearly expressed purpose of the latter, it must follow that, if prior to the enactment of the Constitution a host, who transported without charge a guest, owed to the latter a duty to exercise care, and if the law recognized that a breach of that duty, with a resultant injury, afforded the guest a cause of action, this jural right the constitution preserved against legislative abolition . . . the legislature then sought to withhold jural significance from a breach of duty which previously was regarded as a cause of action. But the purpose of the constitutional provision was to safeguard those ancient rights and preserve as enforceable causes of action any breach of them which resulted in injury to another. The two purposes being in conflict, the constitution must prevail. . . The proponents of this act doubtlessly felt it was unjust that one who gratuitously conveys another in his automobile should be subjected to a claim for damages if an injury should befall the latter. But if the buttress erected by this constitutional provision for the safeguarding of long-established rights can be pierced by this piece of legislation, an entry will be effected through which may come other legislation in substitution for the safe-guarded common-law rights."[4]

In a Michigan statute the owner or operator was relieved from liability unless such accident shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or driver, and unless such gross negligence or wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

In holding the act constitutional, the Supreme Court[5] said: "It would be threshing old straw to discuss the accepted fact that the motor-car has presented social, financial, and governmental problems which justify the legislature in reasonably classify-

1. See notes in 20 A. L. R. 1014; 26 A. L. R. 1425; 40 A. L. R. 1338; 47 A. L. R. 327; 51 A. L. R. 581; 61 A. L. R. 1252 and 65 A. L. R. 952, and cases there cited. See Vol. 1 Blashfield Cyc. Auto Law pg. 955 and cases cited; Vol. 5-6 Huddy Cyc. of Auto Law (9th ed.) pg. 217 & 223.
2. See notes and cases cited under (1) supra.
3. Stewart v. Houk, 127 Or. 589, 271 Pac. 998, 272 Pac. 893, 61 A. L. R. 1236.
4. After the decision of Stewart v. Houk, (3) supra, the Legislature of Oregon passed another guest statute exonerating the driver except the accident was intentional or caused by his gross negligence or intoxication or his reckless disregard for the right of others.
This statute was before the court in Storla vs. Spokane, etc., Transp. Co. (Ore.) 297 Pac. 367 and Smith v. Laflar (Ore.) 2 Pac. (2nd) 18, but its constitutionality was not there questioned.
5. Naudzius v. Lahr, 253 Mich. 216, 234, N. W. 881, 74 A. L. R. 1189.

ing it apart from other vehicles in the enactment of laws. . . . Generally, gratuitous passengers are relatives or friends. Exceptionally, they are mere acquaintances, invited chance pedestrians, or those who deliberately solicit rides. Since the rule of liability was announced, there has been considerable litigation between guests and hosts, some between husband and wife or other close relatives has found its way to this court, (citing cases). In many, probably most, of the cases between relatives or friends the real defendant is an insurance company. Ordinary negligence is not hard to prove, if guest and host co-operate to that end. It is conceivable that such actions are not always unattended by collusion, perjury and consequent fraud upon the court. While we may accept the contention that paid insurers are not objects of special consideration by the Legislature, it is inadmissable for the court to consider a law from the viewpoint that they are not entitled to a proper trial and honest determination of liability in a law suit. Nor are insurance companies alone interested in the question. The results of verdicts are mirrored in insurance rates, and the law provides a possible reason in the juries of the motor owning public, most of whom carry liability insurance. It is not inconceivable that some passengers who solicit rides may manufacture claims for liability. Groups of young folks, engaged upon a joint enterprise of social enjoyment in a borrowed car, have been known to combine to charge the owner for an accident. The law also has social features. It is well known that drivers hesitate to take neighbors for a ride or to assist on his way a weary traveler because of potential liability for injuries. Few, if indeed any, of these features seem to have manifested themselves in the use of other vehicles than motor cars. Perhaps the Legislature also had other reasons for the law. In view of the abundance of personal injury litigation from the operation of motor cars and the conditions readily conceivable as pertinent to the relation of guest passengers in them, which litigation and conditions seem to be substantially absent from the use of other vehicles, it cannot be said that the classification at bar was arbitrary and without reasonable basis.

"Whether the feared evils of the act will produce carelessness in driving and overshadow the evils sought to be remedied by it goes to the wisdom, not the validity of the law, and is for the Legislature, not this court to consider. The Legislature has the right to experiment to attain a desired result."

A Connecticut statute relieved the owner or driver from liability to a guest unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.

The constitutionality of this act was upheld by the highest court of that state, by a divided court[6] and on appeal to the United States Supreme Court its validity was unanimously upheld.[7] In announcing the opinion of that court, Mr. Justice Stone said: "As the record does not disclose the constitutional grounds on which the appellant challenged the validity of the statute, our review will be limited to the single question arising under the Federal Constitution which was considered in the opinion of the court below. . . We need not, therefore, elaborate the rule that the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible object. . . The use of the automoble as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute. We are not unaware of the increasing frequency of litigation in which passengers carried gratuitously in automobiles, often casual guests or licensees, have sought the recovery of large sums for injuries alleged to have been due to negligent operation. In some jurisdictions it has been judicially determined that a lower standard of care should be exacted where the carriage in any type of vehicle is gratuitous. . . Whether there has been a serious increase in the evils of vexatious litigation in this class of cases, where the carriage is by automobile, is for legislative determination, and, if found, may well be the basis of legislative action further restricting the liability. Its wisdom is not the concern of courts. It is said that the vice in the statute is not that it distinguishes between passengers who pay and those who do not, but between gratuitous passengers in automobiles and those in other classes of vehicles. But it is not so evident that no grounds exist for the distinction that we can say *a priori* that the classification is one forbidden as without basis and arbitrary. . . Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restriction, there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none. . . In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. . . It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs."

In Alabama an act providing that the contributory negligence of the driver of a motor vehicle should be imputed to every guest was declared unconstitutional. In so holding, the higher court[8] said: "It may be that the motor vehicle, because of its mechanism and capacity for speed, as well as its rather recent appearance and general use, is considered more dangerous than other vehicles in common use. . . We do not mean to hold that the legislature cannot enjoin upon motor vehicle operatives certain duties and restrictions not placed upon other vehicles of an inherently different nature and character, for the protection of the public. But the right to do this does not authorize the penalizing of people who ride in same, by depriving

6. Silver v. Silver, 108 Conn. 371, 143 Atl. 240, 65 A. L. R. 943.
7. Silver v. Silver, 280 U. S. 117, 74 L. ed. 67, 50 Sup. Ct. Rep. 57.
8. Birmingham-Tuscaloosa Ry. Etc., Co. v. Carpenter, 194 Ala. 141, 69 So. 626.

them of a legal right enjoyed by persons riding in any other kind of vehicle, and such a discrimination cannot be justified upon the basis of a reasonable classification. Section 34 not only discriminates against persons riding in motor vehicles in favor of those riding in all other vehicles under similar conditions, . . the section denies an equal protection of the law to all persons similarly situated, and is an unwarranted discrimination."

In a recent California case[9] the court thus states the reason back of the enactment of limiting liability guest statutes; "The reason, however, is most apparent. From childhood we were taught never to criticize a host who accidentally did us an injury. Since the advent of automobiles, which are comfortable to ride in and which are generally covered vehicles, it is not an insignificant courtesy when the operator offers a gratituous ride to one who is walking in the hot sun or facing a storm. If, while so riding, an accident occurs, it is the greatest of ingratitude if the passenger harshly criticizes his host either outside or within the courts. It is a matter of common knowledge that nearly every operator carries insurance. It has been claimed in the courts that in certain instances the operator of the automobile and the passenger riding with him have entered into collusive agreements for the purpose of compelling the insurance company to pay the damages. Such acts were either grievous fraud or tantamount thereto. It is thus perfectly clear that when the Legislature adopted the amendment to the statute, it did so for the purpose of preventing certain immoral or fraudulent practices."

From the above review of authorities, it would seem to be well settled that the guest statutes holding the driver or owner only in case of "gross negligence" or "wilfulness" or "recklessness" or when the injury is "intentional" or caused by the driver's "reckless disregard of the rights of others" are constitutional.

As we pursue the study further, it is interesting to note the definitions given by the several courts to the above terms, and the application made thereof to the facts in the several cases.

In a California case[10] the court in discussing the term "gross negligence" said: "In many jurisdictions the division of negligence into degrees is not countenanced (20 R. C. L. 21): the concept being that such phrases as 'gross negligence' and 'slight negligence' are misnomers. In this state the degrees of negligence have been frequently recognized. The term 'gross negligence' has been defined as 'the want of slight diligence', as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others', and as 'that want of care which would raise a presumption of the conscious indifference to consequences'."

In an Oregon case[11] the court said: "A very large number of definitions of the term 'gross negligence' may be readily gathered. A reading of them discloses that the courts are not agreed upon the meaning which should be assigned to this term. The word 'negligence' possesses a definite meaning because it is based upon the conduct of a specific individual: that is, the reasonably prudent person. But no definition of the term 'gross negligence' which has come to our attention assumed that the meaning of that term was based upon the conduct of some person whom the common law had selected as a standard, unless it be possibly the conduct of a careless, thoughtless, or inattentive person. Such being true, it is difficult for 'gross negligence' to achieve the definiteness of meaning that 'negligence' possesses. Its import, in individual instances, will possibly be affected somewhat by the manifest purposes of the legislative act. Clearly the object of the present act is to relieve the host from liability for ordinary negligence. It evidently intends that the law applicable to the automobile host should make a distinction between the care owed to a gratuitous guest and a paying passenger somewhat comparable to distinctions made by other branches of the law which discriminate against those who receive services free of charge; for instance, the law of bailments."[12]

In a very recent Iowa case[13] the court said: "In an action by a guest as in the instant case, the guest must allege and prove the 'reckless operation' of the motor vehicle or the intoxication of the driver, and, in order that the conduct of the driver be classified as reckless within the meaning of the statute, it must be such as to manifest a heedless disregard or indifference to the rights of others, and it means more than negligence."

In an earlier Iowa case[14] the court said: "Recklessness may include 'wilfulness' or 'wantonness', but if the conduct is more than negligent, it may be 'reckless' without being 'wilful' or 'wanton', but to be reckless in contemplation of the statute under consideration, one must be more than negligent. Recklessness implies 'no care, coupled with disregard for consequences'."

In a recent Indiana case[15] the appellate court construes the guest statute passed by their legislature in 1929. It is provided in said act that the owner or operator of the car is relieved from liability to a guest except when the accident shall have been "intentional on the part of such owner or operator" or "caused by his reckless disregard of the rights of others."

In reversing the judgment authorizing a recovery, the court points out that it was the evident purpose of the legislature to make some change in the existing law, which prior to the statute authorized a recovery by a guest who was injured by the negligence of the owner or operator. The court further says that in that state, negligence is not classified, there being no degrees of negligence therein. In passing on the meaning of the terms "reckless disregard of the rights of others," the court quotes from Connecticut and Iowa cases where similar statutes are construed and holds that recklessness is more than negligence and that con-

9. Loranger v. Nadean (Cal. App.) 1 Pac. (2nd) 1049. See also Callet v. Alioto, 210 Cal. 65, 290 Pac. 438; Kastel v. Stieber (Cal. App.) 297 Pac. 932.

10. Krause v. Rarity (Sup. Calf.) 293 Pac. 62, 66; Malone v. Clemow (Cal. App.) 295 Pac. 70.

11. Storla v. Spokane, etc., Transp. Co., (Or.) 297 Pac. 867.

12. Citing as authority 4 A. L. R. 1209 & Cyc. of Automobile Law pg. 959.

13. Wilde v. Griffel, et al, (Iowa) 243 N. W. 159.

14. Siesseger v. Puth (Iowa) 229 N. W. 46, 54. See definition of Reckless Driving under New York Reckless Driving Statute, People v. Grogan (N. Y) 183 N. E. 273.

15. Coconower v. Stoddard (Ind. App.) 182 N. E. 466. Citing and relying upon Silver v. Silver, 108 Conn. 371, 143 Atl. 240; Grant v. MacLelland, 109 Conn. 517, 147 Atl. 136; Ascher v. H. E. Friedman, Inc., 110 Conn. 1, 147 Atl. 263, 264; Siesseger v. Puth (Iowa) 239 N. W. 46, 54; Kaplan v. Kaplan (Iowa) 239 N. W. 682, 684; see late case of Sandinsky v. Coughlin (Conn.) 159 Atl. 492.

duct indicating a reckless disregard of the rights of others is quite distinct in its characteristics from merely negligent conduct, but constituted wanton conduct. It was further held that as recklessness is more than negligence, it follows that contributory negligence is not an element to be considered or dealt with, in cases brought under the guest act.

In the following cases, the rules and definitions stated above were applied to the evidence with the following conclusions:

No reckless operation under the Iowa statute was held shown where a car ran into a storm, the rising water killed the engine, and the occupants got out of the car and some of them were carried by the force of the water into a wire fence, in a Minnesota case[16] where a directed verdict for defendant was upheld.

The falling asleep of the driver causing the accident would not justify a recovery under the statutes.[17]

A finding of wilful negligence was held justified upon evidence that, although warned as to a dangerous curve by a sign calling attention thereto, and also requested to slow up, the driver persisted in keeping up his speed, with the result that the car landed in a ditch, broke off a telephone pole, and did not stop until it went 150 feet beyond the pole in a Vermont[18] case.

A finding of "reckless operation" of the car within the Iowa statute was held warranted where the driver failed to notice warning signs at a railroad crossing and tried to spurt across the track when he saw a train almost upon him.[19]

In Michigan it was held that the owner's act in intrusting the car's operation, while he was in it, to his seventeen-year-old son, who was alleged to be inexperienced, unskilful and incompetent, was not of itself gross negligence; and further that even if gross negligence could be predicated upon so intrusting the car to his son, such gross negligence was not charged to be the proximate cause of the guest's injury, which was said to be caused by the boy's ordinary negligence in losing control of the car.[20]

In a recent Iowa case[21] it was held to be recklessness under the guest statute where one driving at night on slippery pavements was arguing angrily with one of the occupants and paid no attention to requests to drive slower, and skidded and overturned while rounding a curve at a speed of fifty-five miles per hour.

But the question of gross negligence being for the jury, its finding of no gross negligence, upon conflicting evidence as to the speed of a car which passed a bus going in the same direction, there being testimony that the driver of the bus increased its speed while the other car was trying to pass, was sustained in an Oregon case.[22]

16. Marquart v. Meyer, 181 Minn. 504, 233 N. W. 309.
17. DeShetler v. Kordt (Ohio Court of Appeal) 183 N. E. 85; Coconower v. Stoddard (Ind. App.) 182 N. E. 466; Kaplan v. Kaplan (Iowa) 239 N. W. 682. But see Contra Potz v. Williams (Conn.) 155 Atl. 211.
18. Sorrell v. White (Vt.) 153 Atl. 359.
19. Brandsoy v. Bromeland, 177 Minn. 298, 225 N. W. 162.
20. Naudzius v. Lahr, 253 Mich. 216, 234 N. W. 581, 74 A. L. R. 1189; see the following more recent Michigan cases under the guest statute: Boyle v. Moreley (Mich.) 241 N. W. 849; Finkler v. Zimmer, (Mich.) 241 N. W. 851, where the court said, "Gross negligence, subsequent negligence, antecedent negligence, discovered negligence, discovered peril, last clear chance, intervening negligence, supervening negligence, humanitarian rule are the same thing"; Bobich v. Rogers (Mich.) 241 N. W. 854.
21. McQuillen v. Meyers (Iowa) 241 N. W. 442.
22. Storla v. Spokane, etc., Transp. Co. (Or.) 297 Pac. 367, 298 Pac. 1065.

A finding that the driver's conduct was not such as to indicate a reckless disregard of the rights of others was upheld in a Connecticut case[23] where he was driving on a down-grade behind two or three other cars, and pulled to the left in an effort to pass them just as the driver of the car immediately in front tried to do likewise, and caught his left rear wheel on the edge of the paved portion of the road, occasioning a skid across the road, as he was about to pass that car.

In a Washington case[24] the lady driver felt in her lap for her hand bag and not finding it, looked down and saw it had slipped from her lap. She reached down for it and while her eyes were off the road momentarily, her car crashed into a pole injuring a guest. There was a recovery below, but the higher court reversed the case holding that the evidence was not sufficient to constitute gross negligence which must be shown before recovery can be had under the guest statute.

In a recent California case[25] the driver was momentarily blinded by the sun and before he could stop his automobile or recover his vision, the car drew over to the left side of the curve and into the embankment injuring the plaintiff, who was a guest. A nonsuit was granted by the lower court and in affirming the judgment, the Court of Appeals said: "Appellant makes no claim that respondent was intoxicated or guilty of wilful misconduct, and consequently under the requirements of said section (the guest act), before she was entitled to damages, it was essential for her to establish that her injuries were the result of respondent's gross negligence. . . In view of the foregoing undisputed facts, the trial court was fully justified, in our opinion, in holding as a matter of law that appellant's claim of gross negligence was unsupported."

It is apparent from the above review of the authorities, that by the adoption of the guest statute, the several states so doing, have in fact adopted the minority or Massachusetts rule of no recovery without gross negligence.

23. Grasso v. Frattolillo, 111 Conn. 209, 149 Atl. 838. See also Nemoitin v. Berger, 111 Conn. 88, 149 Atl. 233; Silver v. Silver, 108 Conn. 371, 143 Atl. 240, 65 A. L. R. 943; Ascher v. Friedman, 110 Conn. 1, 147 Atl. 263; Maher v. Fahy, 112 Conn. 76, 151 Atl. 318; Rindge v. Holbrook, 111 Conn. 72, 149 Atl. 231; Siller v. Siller (Conn.) 151 Atl. 524 (holding guest act did not apply to injuries received prior thereto); Bryll v. Bryll (Conn.) 159 Atl. 884; recovery upheld under guest act Leonetti v. Coppola et al, (Conn.) 161 Atl. 797, decided August, 1932.
24. Craig v. McAlee et al, (Wash.) 295 Pac. 146. See also MacDonald v. Balletti, (Wash.) 4 Pac. (2nd) 506.
25. Binus v. Standen, (Cal. App.) 5 Pac. (2nd) 637.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

LYING AND ITS DETECTION, by John A. Larson. 1932. Chicago: University of Chicago Press. Pp. xxii, + 453.—This book was prepared as a Behavior Research Fund Monograph (series edited by Prof. Ernest W. Burgess). George W. Haney and Leonarde Keeler collaborated with the author. Dr. Larson's qualifications for the study are unusual. His training embraces advanced academic study in physiology and medicine, combined with broad practical psychiatric, criminological experience and police work. He deals with both theoretical and practical aspects of the problem.

The book is divided into four main parts. In the first part the problem of deception is examined in its fundamentals, with a discussion of classes of lies, differences as between children and adults and between the sexes, and a consideration of the emotional and physiological reactions accompanying lying. The second part is a summary of historical methods of determining the truth, covering such matters as combat, ordeal, and torture, modern police methods (the so-called "third degree" and other practices), the judge and jury, confessions and evidence as truth-finding agencies. Part three deals with modern scientific methods including rather interesting chapters on word-association tests and the use of scopolamin (truth-serum). All of the first three sections of the book consist almost entirely of quotations from the extensive literature in the field. They contain very little original comment by the author and serve principally as a basis for the fourth part, beginning on page 253, dealing with cardio-pneumo-psychograph experiments—the popularly termed "lie detector." The general reader might perhaps be advised to begin the book at this point.

The "lie detector" is a fairly simple recording instrument making continuous and parallel graphs of the respiration and blood pressure. The theory is that the subject will have involuntary and uncontrollable disturbances of blood pressure and respiration indicating emotion accompanying the telling of a lie. Questions are framed to be answered by a simple "yes" or "no." Other conditions during the test are controlled to exclude other stimuli as much as possible and to create a situation wherein the subject must be conscious of the truth or falsity of his statements and not exposed to any other emotional disturbances. Before any crucial questions are asked it is always necessary to ask a series of trivial questions to secure a normal graph for the individual being tested. This normal will serve as a standard from which deviations indicating emotional disturbances may be noted. Dr. Larson draws upon his long experience with the machine for many interesting cases ranging from petty fraternity house thievery to murder. In numerous instances the record of the machine clearly showing disturbances has been instrumental in securing confession. The machine seems to have displayed a high degree of reliability though not infallibility in those cases where it was possible to verify the results by later definite proofs. The author has found, possibly contrary to expectation, that lying is as easily detected in extreme recidivists as in those not experienced in crime. He has also found that in practice it is generally possible to distinguish disturbances caused by the fear of the innocent from those caused by lies. In many cases where several suspects of a single crime have been questioned it was possible by means of the test to eliminate the innocent and select the guilty party.

In spite of the apparent meeting of these two obvious criticisms, the author recognizes and clearly states the limitations which must inevitably accompany the use of a machine which can only measure two variable physiological conditions accompanying a wide range of emotional disturbances. In evaluating the machine's usefulness in the legal process the author is very strongly of the opinion that in its present state the lie detector ought not to be introduced in the court room, nor its results given as evidence. The machine is not infallible. The device must be employed and the graphic records interpreted by experienced examiners. Dr. Larson considers that the principal sphere of the machine is in preliminary police investigative work. It may be used effectively where there are several suspects to a crime. Most of them can be eliminated and police effort can be expended on the more likely ones, those which show disturbed records. In many cases disturbances on certain questions may give police officers fruitful leads for further work. In no case should the test results be relied upon without independent corroborative evidence. Of course, a suspect cannot be compelled to submit to a test, and it would be impossible to take a test on a violently resisting suspect. However, the machine method in the hands of competent operators would seem to be far more reliable and less objectionable than many of our present police practices verging onto the "third degree."

In connection with his discussion of the lie detector in police work, the author makes a strong plea for the removal of police forces from political influences and for the development of competent officers trained in criminology and psychology, so giving the police investigator a professional status.

Chicago. ROGER L. GOETZ.

Regulation of Public Utilities: A Crucial Problem in Constitutional Government, by Cassius M. Clay. 1932. New York: Henry Holt and Co. Pp. xi, + 309. The primary interest of this book is concerned with electric power regulation. This brings up, in outline, a review of what has already been done in other fields of regulation in respect of public utility corporations; the successes and failures and their reasons; the question of the applicability, by extension, of the existing method and base of rate regulation to the new problems of electric power.

Utility regulation is "a crucial problem in constitutional government," involving as it does the question of the appropriate distribution of power between the courts and legislative bodies and regulatory commissions. The central difficulty in rate regulation today is the uncertainty of the law of valuation. The moot question of state versus national control, typified in holding companies, adds to this complexity.

The author, who shows skill in selecting representative extracts from important decisions, in no place shows greater skill than is manifested in the selection of extracts from the decisions of Mr. Justice Holmes. In the extracts so chosen, there is set forth a plea for reasonable latitude to the States in the exercise of their powers. The analysis that is made leads to consideration of the decisions of the Supreme Court in the matter of rate regulation.

In passing upon rate cases which have found their way up to the United States Supreme Court, it has been found necessary to consider valuation. In so doing, the Court has laid stress on reproduction costs (less depreciation) as the proper and necessary basis. Section 1 of the 14th Amendment forbids any State to "deprive any person of life, liberty, or property without due process of law." The due process clause of the 14th Amendment is of wide scope and is involved in every case where a Utility asserts that an Act of a State legislature or of a Commission legally created by it is confiscatory in its effect.

The appeals arising involving "due process of law" have been almost wholly concerned with litigation relating to social and economic state legislation. This is of interest because the developments that have taken place were clearly not in the minds of the framers of the Amendment. Apparently what was in mind was the enactment of a constitutional provision which would protect the newly enfranchised negro citizen.

Gradually, the clause dealing with "due process of law" has obtained a more and more dominant position. This is especially noticeable in connection with railway rate appeals. The leading case, *C. M. & St. P. R. R. Co. v. Minnesota*, which was decided in 1890, held that a State law which provided that a State Commission might fix railway rates which should be "final and conclusive as to what are lawful or equal and reasonable charges" did not constitute due process of law and was, therefore, in violation of the Constitution of the United States. The evolution of the "due process" clause beginning with the *Minnesota Case* represents an attempt to develop rational limitations beyond which Legislatures and Commissions may not go.

Mr. Justice Bradley, one of the dissenting Judges, pointed out that in earlier decisions it had been held that the regulation and settlement of the fares of railways and other public accommodations was a legislative prerogative and not a judicial one. He held that the finding in the *Minnesota Case* overruled this, and that the decisions now rendered declare in effect that the Judiciary and not the Legislature is the final arbiter in the regulation of fares and freight of railways and the charges for other public accommodations.

Smyth vs. Ames, decided in 1898, held that the basis of calculation regarding reasonableness of rates to be charged by a corporation operating a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public.

Reproduction cost was, in the first instance, regarded as a protection against inflated book cost. A swing in another direction has emphasized prudent investment cost.

Fair value is a legal concept, but when examined from an economic standpoint is found, states the author, to rest upon an artificial basis. The limitations, in place, of a utility are such that its value cannot be definitely determined in the marketplace. The author's words of criticism may be quoted:

". . . fair value when used with respect to property in regulated industry is a purely legal fiction and nothing more."

He is equally critical of cost of reproduction. He recognizes at the same time that reliance on cost of reproduction may, at a later time, create difficulties in respect of capital invested at an earlier date or when costs of production, labor, and material are higher. Commissioner Eastman of the Interstate Commerce Commission is quoted, also, as pointing out that valuation doctrine has entailed many delays and much expense.

About one-half of the book is taken up with the very modern question of electrical power control. It might be easily assumed that electrical power was a matter essentially of interstate significance and to be controlled, therefore, in the same way as railway rates under the Interstate Commerce Commission; but a searching criticism of what is involved shows differences in the power situation and the rate situation.

The electric power industry of the United States has annual gross revenues of approximately $2,000,000,000, and an annual budget for new construction of nearly $1,000,000,000. In the period 1902-1922, the number of persons employed in the industry increased 400%; the kilowatt capacity increased 1100%; and the output increased 1500%.

The latest surveys show that electrical power is singularly intra-state in its nature. The latest computation shows that only approximately 13% of the electrical energy generated is carried across state lines. This is in sharp contrast with the condition existing in interstate commerce as between the interstate and intra-state movements. When the investigation was made by the Cullom Committee, which resulted in the enactment of the Act to regulate Commerce, it was reported that the interstate commerce movement was 15% of the total.

Transmission of electric power across State boundaries may be concerned, on the one hand, with production of power in one State and its transmission and sale, in wholesale quantities, to a distributing company in an adjoining State where it is

retailed to the consumer. This, the author points out, is sometimes called wholesale interstate transmission. On the other hand, the generating or distributing company may transmit current across State lines directly to consumers in an adjoining State. This is described as retail interstate transmission.

It is established that the States have no power to regulate the rates of wholesale interstate transmission of electricity. As the Federal Government has not taken control over this phase of the matter, there is, therefore, a gap in the field of regulation.

There is absence of direct authority in regard to the status, from the standpoint of regulation in the case of retail interstate transmission, so far as electricity is concerned. Reference may be made, however, to a decision of 1924 by the Supreme Court of the United States in the *Pennsylvania Case*. There it was held that the Public Service Commission of New York had power to control rates on gas originating in Pennsylvania and thence carried into and retained in New York. Inferentially, this covers the electric power situation as well. (See 283 W. S., 465; 286 W. S. 165).

The "holding company" plays an important part in connection with electric power. In a narrow sense, it means a corporation whose principal business is the holding or ownership of stocks of subsidiary corporations. In a broader sense, the following types are set out: The company organized for the purpose of controlling stock ownership or direction of the policies and management of subsidiary corporations; the company which supplies financing, management, engineering, and other technical services to operating utilities; companies which merely own stock or securities of other corporations and in which the characteristics of an investment company prevail. Various modifications of these three general forms present themselves.

The scope of the holding companies' activities is given as of the year 1925. At that date, 76½% of the total electric power generating capacity in the United States was controlled by holding groups.

It is recognized that the management type of the holding company may bring about numerous economies in financing, constructing, mass purchasing, engineering, accounting and in management. On the other hand, certain dangers are pointed out. The responsibility under the holding company is primarily to the investor rather than to the ratepayer. The complexities of some holding companies stimulate increase of risk to uninformed investors. There is a danger to the investor in that it may create pyramiding practices. The Federal Trade Commission has pointed out that the acquisition of control of operating utilities by holding companies restrains competition among the service organizations. The arguments pro and con are very pertinent, in view of the discussion which is taking place in regard to holding companies, their practices, advantages and disadvantages, as well as the methods of control and constitutional issues involved.

The decisions and criticisms are warning finger posts. The difficulties in the Federal arena are pointed out as emphasizing the importance of the State field, it also being held in mind that from a percentage standpoint electric power is much more important in the intra-state field than in the inter-state field.

Not only from the standpoint of the principles developed in the critical analysis of the text, but also from the standpoint of general principle, the author makes a plea in minimization of centralized control and in favor of supporting the powers of the States. The following words may be quoted as giving the central thought of this study:

"Not only the Court, but also the public, should ever recognize that the responsibility of providing for the various utilities within the sphere of State action, rates that are economically and socially satisfactorily in excess of the constitutional deadline of fairness, is one that belongs properly to the individual States, varying, as they do, in their specialized local needs and requirements."

The author covers a wide scope in small compass. The reviewer hopes that others will find the book as interesting and illuminating as he has found it. The book is well documented. From the standpoint of continuity of reading, the author is to be commended on having the various references at the end of the respective chapters and not in footnotes. The material would, however, have been in more satisfactory shape if an index had been provided.

S. J. McLEAN.
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The Life of Lord Carson, Volume One. By Edward Marjoribanks. 1932. London: Victor Gollancz, Ltd. (Published in the United States under the title *Carson the Advocate*, by Macmillan Co., New York City.) Pp. viii, 455—Edward Marjoribanks will be remembered as the author of the fascinating life of Sir Edward Marshall Hall, published in this country under the title of *For the Defense*.

A biographer could hardly have chosen for study personalities more contrasting than Sir Edward Marshall Hall and Lord Carson. One was volatile, somewhat histrionic, anchored to few convictions, especially the popular conception of the advocate, who will be remembered solely as the protagonist in sensational causes; the other is a man of rugged character, giving to all but his intimate friends the impression of being somewhat dour, tenacious of and insistent upon his beliefs (as in his championship of Ulster) in and out of season, a great advocate whose advocacy is likely to be forgotten because overshadowed by the fact that for many years he played so major a role in one phase of British politics that he earned the right to be called the founder of Northern Ireland.

With this in mind it would have been natural to expect the average biographer to concentrate upon Lord Carson's political life to the neglect of his career at the Bar. The present volume, however, deals almost exclusively with the barrister. Marjoribanks evidently set out to write a comprehensive account of both aspects of Lord Carson's life, but his death, after he had finished the first volume, prevented the completion of his work.

This volume being a unit, the fact that the work itself is incomplete will detract little from its interest for American lawyers, for whom the brilliancy of Carson's advocacy holds a more sympathetic appeal than his intransigent political leadership. There is, indeed, here just enough of Carson's political life to enable one fully to understand the character of the man. As crown counsel and solicitor general for Ireland he

prosecuted lawlessness so relentlessly that he was dubbed "Coercion" Carson. As member of the house of commons from Dublin university and even when British solicitor general, in utter disregard of his personal fortunes, he fought for what he conceived to be the rights of Ulster with such a singleness of purpose that Balfour once felt called upon to remind him that there were in the realm of British politics other questions than that of Ireland.

Carson brought to the bar the same uncompromising belief in the justice of his causes. He brought also great ability, an almost uncanny gift for cross-examination and, if not eloquence, the power of convincing argument and virulent invective. But in the last analysis his triumph was the triumph of character.

This great and fearless force of character emphasizes the contrast between Carson and Marshall Hall. Both had frequent clashes with the judges before whom they practiced. These encounters threatened, at one time, to ruin Hall's career and did in the end seriously interfere with it. From them Carson emerged with enhanced prestige. Hall once asked Carson the reason, and the reply was: "The difference between you and me, Marshall, is that when I row with a Judge, I'm always right. When you have a row with a Judge, you're always wrong!"

This difference in character probably explains why in the house of commons (the grave of the reputations of eminent lawyers) Marshall Hall failed and Carson succeeded.

Marjoribanks thinks that "as an advocate it would probably be agreed that Carson stood head and shoulders above any pleader of this century." (P. 4). Yet among his rivals at the bar, in addition to Sir Edward Marshall Hall, were Sir Edward Clarke, F. E. Smith (Birkenhead,) and Sir Rufus Isaacs (the Marquess of Reading). Carson and Isaacs were opposed in many celebrated cases, and one of the most interesting chapters compares their methods of advocacy.

Of chief interest in *For the Defense* were the stories of the sensational cases in which Marshall Hall was engaged. Carson led in cases of greater importance, though not always so sensational. These cases also Marjoribanks reported with unfailing skill: among them the Oscar Wilde case, the libel suit of W. S. Gilbert (of Gilbert and Sullivan), the defense of Dr. Jameson of "The Jameson Raid" fame, the trial of "Colonel" Lynch, the Chapman poisoning case, the Alaskan boundary dispute and the famous libel suit of *Cadbury v. Standard Newspapers* and *Lever v. The Daily Mail*, in the last of which Carson obtained a settlement of $250,000.

The Chapman poisoning case was the most sensational criminal case of its decade, the Alaskan boundary dispute an epochal arbitration, and the Jameson Raid case a great state trial.

Of even more sensational and lasting interest was Carson's successful conduct of the Oscar Wilde case. Carson was loath to accept this brief. The unsavory nature of the case repelled him. He and Wilde had been classmates at Trinity College, Dublin, and Carson never quite held the orthodox view usually maintained by the great men of the law that a counsel is "on the rack and must take any case that comes his way," (p. 199). Only after he had become entirely convinced that the ugly rumors (because of whose circulation Wilde had prosecuted the Marquis of Queensberry for criminal libel) were true did Carson agree to assume the defense. Once enlisted, however, he was unsparing in his efforts to crush Wilde. He realized that on this case he staked, in large measure, his forensic reputation. Wilde was a great literary personage and Queensberry's charges against him were of the most heinous character. If these charges were proved to be groundless, counsel who sponsored them could hardly hope to escape a share of the obloquy which would be visited upon all concerned. The result, of course, was that, though Wilde was one of the cleverest men of his generation and a verbal fencer without a superior, he left the witness box, after Carson's cross-examination, utterly broken and forever discredited.

Carson declined to participate in the criminal prosecution that followed and left it to the law officers of the Crown to send Wilde to Reading gaol.

As important and absorbing as are these cases, they leave an impression quite different from that left by those of Sir Edward Marshall Hall. The difference is that Marshall Hall merited attention because of the trials in which he so brilliantly participated, while Carson was always greater than any cause he ever led.

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Rules of the Supreme Court, 1883-1932. London: H. M. Stationery Office. This volume of 303 pages contains the rules as modified and now in force, relating to procedure in the "High Court of Justice" and the "Court of Appeals" which courts together constitute the "Supreme Court."

It is very interesting to note that in Great Britain, where parliament is not limited by the provisions of a written constitution and where the American doctrine of the separation of the powers of government into three departments, legislative, executive and judicial, has only an academic existence, there has for half a century been a practical recognition of the principle that judicial procedure is best regulated by rules of court, while in the United States where the doctrine of the separation of powers had its origin and is re-enforced by prohibitions in all our constitutions, State and federal, there has been for a century and a half general acquiescence in a deliberate and continued invasion by the legislative department of the judicial domain in the enactment of rigid and minute directions concerning the manner in which the courts should exercise powers vested exclusively in them.

To restate the matter more briefly, the British parliament has refrained from exercising control of court procedure and delegated it to judges and lawyers (with occasional lay co-operation) while our American legislatures, notwithstanding constitutional prohibition, have taken the opposite course.

Space is here lacking to deal with the details of the English rules of practice. The system was analyzed and explained by Professor Rosenbaum in a series of articles published in 1915 in the University of Pennsylvania Law Review (Vol. 65, pp. 105, 151, 380, 505).

The volume under review embodies those changes in the English rules referred to by Edward S. Greenbaum of the New York bar in his article, "English Justice through English Eyes," in the July, 1932, number of this Journal, p. 451, in which he shows the effective influence of the London chamber of commerce in cooperating with the rule committee of the supreme court in evolving new rules of procedure for the prevention of delay and

expense, and the promptness with which new methods are put into operation by the exercise of the rule-making power, compared with the interminable delay which here ensues in any effort to improve judicial procedure by legislative enactment.

The latest changes in these rules are discussed by Mr. Walter P. Armstrong in a most interesting and informative article in our February, 1933, issue (pp. 77-81) which will fully repay the time spent in careful perusal.

It may be that the English rules are too numerous and too complex, and go too much into minor details. Perhaps English litigation is too costly, as English lay critics aver, but the facility with which evils may be corrected by amendment of the rules, and remedies tested by actual use and either retained, modified or rejected, demonstrates the superiority of rules over statutes for the purposes of the improvement of judicial procedure.

This volume should be in the library of every law school and bar association. It will be of great value wherever lawyers are concerned in the improvement of legal procedure and judges begin to exercise more comprehensively their rule-making power.

EDGAR B. TOLMAN.

Leading Articles in Current Legal Periodicals

California Law Review, March (Berkeley, Cal.)—Exemption from the Property Tax in California, by Claude W. Stimson; Community Property and the Conflict of Laws, by Robert A. Leflar.

University of Cincinnati Law Review, January (Cincinnati, Ohio)—Rate Planning—A Departure from Fair Return on Fair Value Methods, by Irwin S. Rosenbaum; The Credit Union Act of Ohio, by Jack E. Nida; Ohio Courts and the Reports of Their Decisions, by George C. Trautwein.

West Virginia Law Quarterly, February (Morgantown, W. Va.)—The Study of American Legal History, by Joseph H. Beale; Minimizing Federal Income Taxes upon the Sale of Corporate Assets, by Jackson D. Altizer; West Virginia Annotations to the Restatements of Conflict of Laws and Contracts, by Edmund C. Dickinson and Thomas C. Billig.

Commercial Law Journal, March (Chicago)—Juvenal on our Profession, by William Renwick Riddell; Liberation of the Judiciary from Political Servitude, by Grover C. McLaren; The Proposed Indiana Self-Governing Bar Act, by Wilmer T. Fox; Will the Lawyers Respond? by William G. Pickrel.

Illinois Law Review, March (Chicago)—Studies in Realty Mortgage Foreclosures: III. Receiverships, by Homer F. Carey, John W. Brabner-Smith; "Fright" Cases, by Leon Green; Morgages of After-Acquired Property, by Bert Louis Klooster.

Michigan State Bar Journal, February (Ann Arbor, Mich.)—The Challenge to the Courts, by James H. Wilkerson; Certain Economic Aspects of Federal Relief Legislation, by Wilson W. Mills; Certain Problems Confronting Creditors When a Revocable Trust Accomplishes Testamentary Succession, by Ray Leslie Alexander; Limitation of Actions and the Conflict of Laws, by Edgar H. Ailes; Publicly Owned Utilities and the Problem of Municipal Debt Limits, by Lawrence L. Durisch; The Value of Sociology to Law, by Robert C. Angell.

Marquette Law Review, February (Milwaukee, Wis.)—Legislative Control of Imitation Dairy Products in Wisconsin, by William L. Crow; Mental Cruelty as Grounds for Divorce, by Meyer H. Weinstein; Joining the Insurer and Insured in Automobile Cases, by J. Walter McKenna; United States Patent Law System, by Ira Milton Jones.

Tulane Law Review, February (New Orleans, La.)—The Formation and Breach of Contract, by William S. Holdsworth; The Declaratory Judgment, by Edwin M. Borchard; The Judicial Status of Non-Registered Foreign Corporations in Latin-America, by Jesse Knight; The Administration of Workmen's Compensation in Louisiana, by Gladys Vonau; Judicial Reorganization, by Ben R. Miller.

Canadian Bar Review, February (Toronto, Ont.)—Equity and Public Wrongs, by Horace E. Read; Delictual Responsibility in the Common Law Provinces of Canada, by John J. Robinette; Federal Influences on the Canadian Cabinet, by Norman McL. Rogers.

Idaho Law Journal, January (Moscow, Ida.)—State Taxation of Electrical Generation for Interstate Transmission, by Sidman L. Barber; Court-Made Torts, by William Lipscomb; The American Law Institute's Restatement of the Law of Contracts with Annotations to the Idaho Statutes and Decisions, by William E. Masterson.

Tennessee Law Review, February (Jackson, Tenn.)—The Faith of the Lawyer, by John J. Parker; Exemption of Life Insurance Policies under Tennessee Statutes and in Bankruptcy, by Joseph A. Grade; The Personnel of the Bar, by Will Shafroth; Should the Standards for Bar Preparation be more Exacting? by John H. Wigmore.

Wisconsin Law Review, February (Madison, Wis.)—Stream Polution and Special Interests, by J. Mark Jacobson; "Arising out of and in the Course of the Employment," in Workmen's Compensation Laws—Part III, by Ray A. Brown; Extent to which Courts of Review will consider Questions not Properly Raised and Preserved—Part III, by Richard V. Campbell.

Rocky Mountain Law Review, December (Boulder, Col.)—John Campbell, by Robert L. Stearns; Mr. Justice Campbell's Contributions to the Law of Colorado, by Henry McAllister; Finality of Findings and Awards of the State Industrial Commission, by William E. Lester; Assignment of Contractual Rights in Colorado, by John W. Finley.

North Carolina Law Review, February (Chapel Hill, N. C.)—The Nationalism of Swift v. Tyson, by J. S. Waterman; The Proposed Constitution and Special, Private and Local Legislation in North Carolina, by Frank P. Spruill, Jr.

Columbia Law Review, December (New York City)—Behind the Law of Divorce: I, by K. N. Llewellyn; The *Lanza* Rule of Successive Prosecutions, by J. A. C. Grant; Inter Vivos Transfers and the Federal Estate Tax, by Stanley S. Surrey, Jacob P. Aronson.

Columbia Law Review, January (New York City)—The Legislative Investigating Committee—Foreword, by Samuel Seabury; A Survey and Critique, by Oren C. Herwitz, William G. Mulligan, Jr.; Methods of Enforcing Satisfaction of Obligations of Public Corporations, by Jeff B. Fordham; Public Welfare Offenses, by Francis B. Sayre.

Harvard Law Review, February (Cambridge, Mass.)—The Basis of Contract, by Morris R. Cohen; Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions, by Malcolm P. Sharp; Twenty Years under the Federal Equity Rules, by Wallace R. Lane.

Virginia Law Review, February (University, Va.)—Corporate reorganization under the Federal Bankruptcy Power, by Robert T. Swaine; An Open Letter Containing Proposals for Amendment of the Bankruptcy Act so as to Aid in Combating the Depression, by James N. Rosenberg; The Enactment of the New Bankruptcy Law Will Check the Tendency Toward Currency Inflation, by George Gordon Battle; The Power of Congress over Corporate Reorganizations, by Lloyd K. Garrison; The Franco American Codes, by Charles Sumner Lobingier.

United States Law Review, February (New York City)—Corporate Reorganizations: Defects and a Remedy, by John A. Seiff; Due Process in Criminal Trials, by Robert E. Ireton.

Iowa Law Review, January (Iowa City, Ia.)—A Symposium on Administrative Law based Upon Legal Writings 1931-33, by Edwin M. Borchard, Abraham H. Feller; Oliver P. Field, Louis L. Jaffe, Daniel James, Dudley O. McGovney; Maurice H. Merrill; Edwin W. Patterson; Paul L. Sayre; Arthur Suzman; John H. Wigmore, John Willis.

CHANGING MATERIALS IN TEACHING OF LAW

Tendencies to a Transition from the Familiar Approach to Law Through the Analytical Categories of Writers and Publishers to One in Which the Emphasis Is Placed on the Transaction to Be Dealt With—Certain Material Already Available to Aid in Adoption of New Approach—Possible Consequence of Such a Shift in Fields of Instruction and Practice

By Charles H. Kinnane
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PUTTING the matter briefly, and so perhaps, not with entire accuracy, it might be said that the type of law school instruction with which most present members of the bar are acquainted, involved almost exclusively an approach to the law by the student and teacher from what might be called the "digest" point of view—in other words, from the point of view of analytical classification of the internal content of the law.

It is planned to suggest here that a new point of approach is necessary, why it is necessary, that there is already a tendency to adopt that approach, that some materials are already available to permit such adoption, that they are already being used for that purpose, and to suggest also some of the possible consequences of such a shift as affecting both the matters of instruction and of practice.

Some centuries ago as the bulk of the law began to increase, it became necessary to reduce its content to some semblance of system. Our medieval compilers of abridgements appear to have met this need as they saw it, by a hasty scratching together of notes on this legal topic or that one, and then to have arranged the law so gathered together, according to their ideas of logical order. These categories were adopted by succeeding abridgers and commentators, and have been preserved to us, by our modern compilers of digests, encyclopedias and text writers as well.

These conventional categories which we have inherited were arrived at by a process of *looking at the law*, and then of splitting it up into such familiar departments as property, contracts, sales, bankruptcy, equity and so forth. That such a method necessarily resulted in a classification on the basis of the law, rather than on the basis of logical analysis of *transactions dealt with by the law*—and by the lawyers—did not seem to be important, for the practising lawyer was supposed to be able to make such investigations as might be necessary to make the translation from legal categories to practical ones. Further it does not appear to have been considered important that a different system of analysis on the basis of practical transactions might have saved the lawyer the burden of making such translations.

To clarify the distinction which it is intended to make by juxtaposing the terms "analysis of law" and "analysis of transactions," suppose we consider the case of a lawyer with a problem involving some type of security transaction. Such a lawyer could look in the digests, encyclopedias and elsewhere for legal data on mortgages, trust deeds, suretyship and so forth. Or if he happened to be interested in a matter of creditors' rights, he might examine the books under the categories dealing with contracts, damages, bankruptcy, execution or creditors' bills. In neither case, however, was there an analysis which would permit him to turn to the subject of creditors, or security transactions, in general. The lawyer, rather than the conventional system of analysis, had to make such a synthesis.

Notwithstanding this situation, however, there does not appear to have been any serious complaint by the profession, that the approach to the law through the analytical categories of the writers and publishers might be imposing a greater burden than would have been necessary if the law had been keyed, analyzed, or classified according to the types of problems with which the lawyer had to deal. The profession does not appear to have complained that a much more useful service would have been rendered if the classifications instead of limiting themselves, for example, to one right of a creditor, as by proceedings taken under a creditor's bill, had been based on the creditor himself, and had considered the remedies of creditors in general so as to include with creditors' bills, the matters of legal execution, general assignments, composition agreements, bankruptcy and so forth. The mere fact of unified treatment of the whole subject of creditors' remedies would have served to present the whole picture of possible action, in place of that fraction of it relating to the one alternative device or another. In addition to the mere factor of juxtaposition, however, there certainly would have been an opportunity for commentary which would have involved a comparison of the alternatives with reference to their respective merits as used on one occasion or another, and even their relative merits when used with the same type of situation.

We have not complained, however, that an analysis in which the transaction as affected by law, rather than an analysis of the law alone, was omitted. Perhaps we have not thought of the possibilities of the former type of analysis. And it has also happened that the teaching materials, as well as the materials devised for the practising lawyer, have retained the same omission. The conventional course of law school instruction is presented under some thirty to fifty digest headings such as contracts, personal property, real property, agency, corporations, equity and so on. That this inherited classification on a logical legal, rather

than a logical practical, basis might not have been the best for the purposes of legal instruction does not appear until quite recently to have been the occasion of any more complaint on the part of teachers, than on the part of lawyers over the materials that were available to them. The good old classifications were good enough. That they had originated in the practice of some of our medieval abridgers and commentators seemed sufficient to endow them with perpetual existence, even though legal instruction was not then what it is now, and in spite of the fact that due to the niggardly legal development of their times, one of the most important aspects of legal practice with which we are familiar had not come to be known.

Our medieval law was a primitive, a limited, an almost unbelievably stingy body of juristic material. Only the most limited number of transactions could be accomplished under it. A body of law that did not know the simple contract, the negotiable instrument, the will of land, the trust, the modern mortgage, the corporation and many other of our modern legal developments, as likely as not afforded no means of accomplishing a desired end, at all. That the same end might be accomplished in a variety of ways was a distinct rarity. On the other hand, the richness and variety of legal alternatives under our modern law may perhaps be said to be the outstanding feature that comes to our attention when it is compared with the English law of a few centuries ago. Where our English forbears had no way of accomplishing a desired end, we frequently have several.

The point of this comparison of the fullness of our modern law with the sketchy outlines of the system of only a few centuries ago is simply this: when our early abridgements and commentaries appeared, there was no such need as we now have for an analysis on the basis of the transaction involved. When there was no way, or only one way of accomplishing the desired end, there was no great need for an analysis and a presentation of the law with reference to the end in view, and it might have been just as well to treat the end from the point of view of the subject, arrived at by an analysis of the law, under which it fell. In our own time, however, when there are often numerous ways of accomplishing the same or substantially similar ends, it seems that our own need is of a type of analysis and treatment which will present the law to us, not only to illustrate the method of accomplishing such an end in a given way, but to illustrate all of the alternative ways of accomplishing the same or similar ends. This need is felt both in the fields of teaching and of practice.

This matter of the existence of alternative ways of doing substantially the same thing under our modern law is so important, and so pertinent to the present discussion that the reader is asked to consider for a moment the available alternatives that might be used to accomplish just one substantially similar group of purposes. There are at least the following methods of transferring the benefit of a chose in action: (1) Assignment; (2) Testamentary gift; (3) Testamentary trust; (4) A living trust with a third person as trustee; (5) A self-declaration of trust; and (6) Transfer by deed. To get the point of the significance of such alternatives, compare the former situation when (1) Choses in action were not assignable; and (2) When trusts were not enforcible. Each of the existing alternative devices may be regarded as a legal tool for getting substantially the same thing done.

With the modern fruitful growth of legal tools for accomplishing the same or similar ends, it would seem that we are in need of a new system of analysis and presentation of legal materials so that the emphasis will be put on the transaction to be dealt with—for one example, the transaction just referred to, of transferring the benefit of a chose in action—and so that the treatment of the transaction will involve the available alternative devices for carrying the transaction into effect. Of course, the mere matter of a new classification is not all that we need. The need is for an entire new approach to the subject of law as a storehouse of tools for accomplishing desired ends, to which the matter of classification will properly be incidental. But as long as the old point of view and the old classification exist, it will serve to hamper us in filling our new need.

II.

There is ground for believing that the transition from the analytical, legalistic approach to the content of the law is already under way, and it is this belief which makes it worth while to consider the means by which such a transition is coming about. As long as the matter rested in the realm of pure theory, it might not be worth while considering here. If, however, it is already coming to be worked out in actual operation, it may merit our attention.

Just how the transition got under way is not easy to say. It is believed, however, that the origins of the movement may be suggested without any great danger of error. In recent years there has been a rising complaint, familiar to all lawyers, about the many defects in our law and its administration. This complaint has begun to bear fruit in the development of a broader professional attitude, a professional interest in and a willingness to consider matters of general pertinence to the matter of legal administration, a professional desire for improvement in both substantive and procedural law, and in an increasing tendency on the part of individual lawyers to project their interests in things legal beyond the immediate concerns of private practice. Definite evidence of this fruit is to be found in the activities of the American Law Institute in "restating" the law for purposes of simplification; in the activity of the Institute of Law and of co-operating bar associations in seeking factual data as to how the law is actually operating; and in the activities of numerous conferences and bar associations in the matter of general improvement of the law. While we are not directly interested here in such concrete workings, we are interested in noticing that they are the result of an increasing tendency to question and inquire, rather than to accept the law as it has been.

This same general inquisitiveness has also taken a direction that is of particular interest here. In inquiring about the operation of the law, specific situations become involved immediately. Situations of predominant importance in our modern legal and social structure might seem to fall under such general heads as economic problems, social problems, and governmental problems. From the

first of these headings, it is only a step to sub-heads dealing with production, marketing and credit. A specific question emerges (particularly in the period since 1929) as to how our credit structure is affected by the law. Thus the general matter of credit is presented. Notice that so far we are not considering specific legalistic heads such as mortgages, accommodation contracts, surety bonds and so forth, but the general problem of credit. Our very terminology has become non-technical. A further division under the non-technical head of "credit" might produce further sub-heads such as unsecured credit, secured credit, and remedies available to unpaid creditors or to insolvent debtors.

By a process substantially like that just outlined, some of the teachers and writers in particular, have come increasingly to think about law in terms of situations involved[1] and of transactions to be effected. It is this shift toward the point of view that the situation involved or the transaction to be accomplished is the starting point, and not the technical legal category, that makes the further matter of alternative devices for dealing with the transaction until a satisfactory result is obtained, so important. For if the problem in the mind of teacher, student and lawyer is not only "Can I use an assignment to vest the beneficial interest in this chose in action in the intended donee?" but is the much broader one of "How can I *best* put the beneficial interest in the intended donee?" the technique of solving the latter question will necessarily involve a comparative study of existing legal rules to find out which, regarding them in the light of competitors, provides the best alternative means of accomplishing the same, or equally satisfactory similar results.

As a rule, however, the splitting up of our law school curriculum into separate courses conforming to our whole approach to transactions from the legal side, instead of from the practical side, has not served to prepare the student for the most efficient handling, when he gets into practice, of transactions which may be dealt with through several alternatives. On the contrary, the student has been offered material on the assignment of choses in action in one year, material on wills in another, and material on trusts at perhaps still another time. Instead of giving him formal instruction on the whole situation of—if we may continue to use the same example—transferring the beneficial interest in a chose in action by way of gift, we have given him part of the problem at one time, part at another, and perhaps other parts not at all. But if he has had a chance at the parts, we are generally content with that, and let him assemble them into a unified body of learning about the whole of the type situation, or not, as he sees fit.

It is now proposed, however, in responsible quarters, that we overhaul our curriculum to end this patchwork system, and to substitute for it a system of instruction based on a new analysis of the problems of modern living and legal practice, in which the starting point will not be some logically analytical category of the law, but a practical, everyday problem of the social citizen and of the lawyer who assists him. From the problem, it is proposed to explore out into such legal fields as seem to have a bearing on it. To use the chose in action situation again, the suggested method will involve a comparative study of the assignment, the will and the trust, and any other devices that offer alternative methods of dealing with the problem. Instead of studying wills, trusts, contracts and deeds with no particular problem in mind, the suggestion is that the problem be picked first, and then that such parts of the law of wills, trusts, contracts, etc., as are pertinent, be studied in connection with the problem until the student is given a complete picture of a typical situation that will come before him in actual practice.

If the suggestion that we substitute functional in place of analytical categories to furnish the problems, had not passed beyond the stage of suggestion, there would be no point perhaps, in writing about the matter here. That the substitute group of categories might be more realistic or practical, would probably not be very important in itself. The important circumstance, however, is that the adoption of such realistic, social or functional categories in place of purely legal or analytical ones is actually under way at the present time.

While it may be admitted that not all of our law is likely to lend itself readily to this type of treatment, there are nonetheless many topics that could be considered under such a method with considerable advantage. For example, in the type case of a client wishing to make a disposition of his property other than under the intestate laws, but wishing at the same time to retain various degrees of control during the remainder of his life, there are immediately some alternatives to consider. How about considering the living trust and the testamentary disposition together and combing them over for a detailed body of data as to whether a deed of trust or a will should be used, comparing with the ambulatory features of the will, the possibility of using a power of revocation reserved in the trust deed? It would seem to be advantageous to do this in the class room as well as in the office and thereby make sure that the student when he gets into the office will actually see the problems which exist because there are such alternatives. It is not enough to know how to use one of several alternatives. The lawyer should also know which of the given alternatives affords the best way. For example, does the trust or the will offer the better plan from the point of view of escaping state or federal inheritance or income taxation? Which offers the greater security to the intended donee from the claims of the donor's creditors? Which will offer the donee the quicker enjoyment on the death of the settlor? Can they both be used to secure the enjoyment to the donee free from the claims of his own creditors?

III.

As a matter of fact, we are already supplied with several important materials of the type needed to put such a program of law study into actual operation. And further, such materials are already being put into actual use in some of the schools. While it is not pretended that a complete study of such materials has been made, it is proposed, however, to refer to some of these new teaching tools in order to give point to the foregoing discussion by concrete illustrations of what these new materials contain and what they are designed to do, in

1. The faculty of the Columbia University Law School has published a comprehensive study of a re-organized curriculum on the basis of social, economic, etc., topics.

the way of avoiding the deficiencies of our ancient legal classifications, and the obstacles both to students and practitioners which have necessarily attended their use.

In 1931 there appeared a book designed for student use which contained cases and other materials compiled under the title of Creditors Rights.[2] An examination of the contents of this book reveals that such diverse topics—from the conventional analytical point of view—as the enforcement of judgments, fraudulent conveyances, general assignments, creditors agreements, receiverships and bankruptcy, have been collected together for the purpose of presenting a unified treatment of the general problem—the type situation—of the rights and remedies of a creditor. It might be noticed that while the problem of the unpaid creditor is a very practical one, probably none of the digests, following as they do the analytical inheritance from medieval times, attempts to present a unified treatment of the various problems that may pertain to the unpaid creditor, or a unified treatment of the various remedial alternatives that may be used, or participated in, by such a creditor.

Another teaching tool of much the same type is a work published in 1930[3] having for its title the subject of Credit Transactions. Here again the emphasis is on the unified treatment of various alternatives pertaining to the type situation of the credit transaction. To carry out this emphasis, the matters of personal suretyship, real suretyship or mortgages and pledges, bankruptcy, accommodation contracts, conditional sales, foreclosure and redemption, among others, are treated.

A set of three volumes of the same general type published in 1931 and 1932[4] presents materials on the law of business units, composed in part of the subject matters treated separately heretofore in the courses of agency, partnership and corporations. The materials treat of management, finance, losses, liabilities and assets of the following types of business organizations: the corporation, the joint stock company, the business trust, the limited partnership association, the limited partnership and the general partnership. Such a unified study of alternative and competing types of business organization seems well designed to permit teaching the student and future lawyer not only the law on these subjects as conventionally presented, but also the comparative utilities of each as compared with the others when a problem as to the preferable type of business organization is involved.

Still another work with similar objects is the partly published material on security transactions[5] designed to present the subjects under this general heading by supplementing the case materials with problem work which is expected to help the student understand the practical background as well as to learn what the law is on the topics within the general field.

Another book published in 1932[6] has for its subject the administration of insolvent estates. Unified treatment is given to the following subjects as all pertaining to the general type situation of the insolvent debtor: Assignments for the benefit of creditors, equity receiverships, bankruptcy, fraudulent conveyances, preferences, non co-operating creditors, control of assets and discharge of the debtor.

In passing, it might be noticed that a volume of case materials for students appeared several years ago,[7] thereby antedating the more recent materials referred to above, which might be considered in the present connection. In the third volume of this work, the author presented materials from the fields of both equity and quasi-contracts, in order to give a unified treatment to the general situation involved under the head of restitution of benefits acquired by fraud, mistake, etc. In view of the fact that the principles applied by the two jurisdictions of common law and equity are much the same in this general type of situation, it would seem that such a compilation of materials would involve the same type of useful synthesis of the law, from the point of view of the transaction involved, that we have been considering.

Recently another work resembling more nearly the first group of books mentioned has been published,[8] having for its general title, Trusts and Estates. Here again material is offered to permit cutting across several fields of law, namely trusts, wills and future interests, in order to work out problems which are affected by the law in all three of these closely related fields. Such a correlation of materials would seem to offer some advantages over the method of separate presentation of wills, trusts and future interests as in the conventional instructional program.

While the foregoing books are not all that might have been referred to under the head of new law teaching materials which evidence the shift from the analytical approach in the law schools, they may serve the present purpose of illustrating by concrete instances just what direction the change in teaching materials is taking.

IV.

While it is not intended to suggest that any of the materials above referred to is the final and completely adequate answer to the teacher's prayer or the student's cry for more suitable teaching materials, or that those materials contain in themselves the final and ultimate solution of all problems in the field of legal teaching, it is desired to suggest that their use cannot, even if the high expectations for them fail, cause any slightest harm to the student. It is not always that even desirable changes can be made without risking something worth while that we have already had. That such risk does not seem to be involved in the present instance is certainly a fact worth considering, not merely for the negative purpose of giving faint praise, but as a basis for encouraging a step that seems meritorious, if such encouragement can be given by merely noticing that a factor which is often a serious obstacle to change does not seem to exist in the present case.

Of course, the program of legal instruction should not be made to usurp the functions of the schools of commerce, sociology and economics, in an effort to present the whole of the transactions

2. By Professor John Hanna of Columbia.
3. By Professor W. A. Sturges of Yale.
4. By Professor W. O. Douglas of Yale and C. M. Shanks of the New York Bar.
5. By Professor Albert Kocourek of Northwestern.
6. By Associate Professor T. C. Billig of West Virginia and Professor H. F. Carey of Northwestern.
7. Published by Professor Walter C. Cook.
8. By Professor R. R. Powell of Columbia.

to be considered. If such a project were adopted, there would obviously be no time left for the study of law. Such a project, however, is no necessary part of the new program that seems to be offered to us.

Accordingly, with such unnecessary elements left out, it hardly seems possible that if all or part of a student's instruction can be presented in the fashion that the above mentioned books make possible, the student will be injured in any way. On the contrary, the change in approach from the analytical categories separately treated, to a unified treatment of typical transactions, involves no less study of the same law that we have been trying to teach in the past. Such a program does not in any way necessarily involve any omission of what has been taught before. It does not necessarily require any subtraction of legal content from the course of instruction. Rather it necessarily involves only the *addition* of unified treatment of the same transactions which have previously been studied, instead of a fragmentary treatment as under the conventional system of separate courses devised along the line of analytical divisions of the law. The desired advantage is to be gained, therefore, by a presentation of materials of a legal character in the light of a particular situation, rather than in the light of no particular situation at all.

If, as will happen frequently, in all probability, some transactions are found to involve only one method of treatment under the law, it will still remain possible to afford that treatment as it has been afforded heretofore. There is nothing in the new program that is being offered to change such a situation as this. Again, if in some fields it is found to be better to retain the present method of presentation for pedagogical or other purposes, the newly offered program does not necessarily interfere. There is no question of dogma, but merely one of practical utility, and since this is so, the new instructional materials with their attendant method may very well remain unused in such cases.

V.

In conclusion, something in the nature of an estimate of the consequences likely to result from the appearance of such new teaching materials as we have referred to, might be indulged in—knowing of course that prophecy is hazardous. In the writer's opinion, the following seem to be involved: (1) A rather considerable likelihood that there will be a rather complete reorganization of the present type of law school curriculum—just when of course cannot be said; (2) As a consequence of this, more than a fair chance that the student will be better prepared to handle the actual problems of professional practice; (3) As a consequence of the constant inquiry as to the comparative utilities of legal alternatives, the inculcation of the bar at its source, with a type of mind likely to question, rather than to accept, the right of some of our law to continue to exist; (4) As the result of this habit of inquiry, a greater consciousness of the fact that from time to time various of our legal institutions come to need overhauling; and (5) As a further consequence of the habit of inquiry into the actual working of the law, a more general interest on the part of the individual lawyer, and of the bar of the future, on the whole matter of juristic development, so that the individual lawyer will tend increasingly to be more than a practitioner but something of a jurist as well.

South American Current Practices

I. COLOMBIA

By GORDON IRELAND*

THE fundamental law of Colombia is the Constitution of August 5, 1886, as amended on October 31, 1910. The substantive law is contained mainly in the Civil Code, based on that of Chile and adopted in 1887, the Code of Land Commerce, also adopted in 1887, and the Penal Code of 1890. The Code of Procedure was adopted in 1887, the operation of a new one enacted in 1923 having been indefinitely suspended, as has been the operation of a new and extremely modern Penal Code, adopted in 1922.

The United States Uniform Negotiable Instruments Law, with slight modifications, was enacted as Law No. 46, July 19, 1923; and is said to be working well, the judges and courts actually looking to United States decisions and precedents, as cited in Digests, for resolution of the many points new to Spanish procedure. This the Columbians find perhaps easier than might some of the other Republics because of their accustomed history of legal change, through the rather vague persistence of the Codes of the Indies without general collection or revision during the early years of the Republic, the alteration involved in the adoption of the Code Napoleon and accompanying laws about 1857, and the further substantial change in 1887 when the Chilean system was brought in. A recent Law, No. 28 of 1932, liberalizes somewhat the position of women, permitting the married woman to manage her own property and appear freely in matters connected therewith and in lawsuits without the necessity of previous permission or simultaneous concurrence of her husband; at the dissolution of the marriage for any cause (not divorce, as yet) contracts and irrevocable gifts between the spouses are treated as null; and during the marriage each spouse hereafter will have the free administration of the property he brought to the partnership or acquired on his own part subsequent to the marriage.

A Financial Law, No. 37 of Nov. 26, 1932, controls the currency and exterior banking operations of the country, all foreign exchange now having to pass through the Bank of the Republic at the official rates and limitations. The important current Oil Law, of 1931, superseded that of 1919. Railroads are national. Foreigners' Law No. 145 of 1888 as applied by Executive Decree No. 300 of 1932 re-

*Mr. Ireland, who has been for three years Assistant Professor of Latin-American Law at the Harvard Law School, is now making an extended trip in South America. He has promised the JOURNAL to write a letter of more or less informal description of procedure, courts and lawyers in each of the countries visited. This is the first of the series.

quires residence Cédulas for every alien remaining in the Republic over five days, involving police and health certificates, photographs, identification measurements and all ten finger prints (which remain on file). For obtaining registered mail, a separate Postal Cédula is required; and on leaving, the Port Health Officer must also furnish a clean bill of health. The President and full Senate of 56 members are elected in February (in 1930 and quadrennially) and take office August 7th, for four years; and the House of Representatives of 118 (in 1932 and biennially) for two years. Congress meets each July 20th for a session of ninety days, which may, however, be extended. Assemblies of the fourteen Departments to the total of 272 Deputies are elected in February of the odd-numbered years.

Dr. Enrique Olaya Herrera, Liberal, the present President, who won in 1930 by reason of a split of the Conservatives between two candidates, is said not to want to run again; and the candidacy of Gen. Alfredo Vasquez Cobo, apparently the present leading Conservative, will presumably depend upon the outcome of the military expedition on the Amazon, of which he is Commander-in-Chief.

The Supreme Court, of twelve members, sits in four Sessions to hear constitutional, civil and criminal appeals and cassation questions; it meets every Thursday for the assignment of cases. The Council of State, of seven members of the current government, hears appeals on administrative matters and from Ministerial decisions and decrees and settles the policy as to concessions, vacant lands and other questions involving public property and funds. There are Tribunals for civil cases and Superior Courts for criminal cases in each of the judicial districts in which the Departments are grouped, and Circuit or Municipal and District or Police Courts for civil and criminal business, respectively, in the smaller juridical units. There are never more than two instances, aside from the possibility of cassation, in any cause; and a party may plead his own cause anywhere, or a lawyer proceeds directly in the courts, without the necessity of any Procurador, as in some Spanish derived jurisdictions. There are Code provisions that the Court must render a decision within sixty days after the parties have been cited for judgment and the case thus closed, but these provisions are practically unenforceable, as the judge against whom any complaint is made invariably pleads pressure and quantity of work to be done, and no discipline can be enforced. This delay, especially in civil cases, in which five years is not an unusual time for a case to reach final decision in the Supreme Court, is the greatest current evil of the law, professors and practitioners appear to agree, but they have as yet offered no substantial remedy.

As an illustration of the petty nature of much of the criminal work, it may be noted that for administrative purposes the Police Courts of the Capital have divided their cases between three about equally busy parts, taking respectively matters involving less than $10, between $10 and $20, and over $20. A misdemeanor jail sentence may be commuted by the payment of $4.00 for each day; but as the common laborer earns from 25 to 60 cents per day of hard work outside, most of them serve out their brief terms. The Prosecutor as well as the Defendant may appeal from the decision of a criminal court on a matter of law alleged to have been determined improperly by the judge, but the decision as to the facts is made by a majority of three in a jury of five for all the more serious crimes, such as homicide, burglary at night, arson of an inhabited building, and their verdict is final. There is a habeas corpus law, not often invoked, and homicide is bailable. Members of Congress may be arrested in flagrante delictu, but must be turned over to their Chamber at once, if in session, or to the respective legislative officers, for trial by their Chamber, or decision on the administrative request that their immunity be suspended and they be returned to the ordinary courts for trial.

The law course is five years, directly following the Colegio (High School) bachelorate, and graduates of the National University or of four other approved Law Faculties in Bogotá and four or five in other cities of the Republic are admitted to practice, if they are Colombian citizens, immediately upon receiving their Doctor's degree, without further examination or other requirement. (Medical Doctors are required to spend one year more, their sixth, in interneship in a recognized Hospital). The law schools use practically no texts, beyond their professors' own, except the standard French commentaries. University students take active part in current politics and have the influence usual in Latin law countries; some ten years ago those of Bogotá by a peaceful strike forced the resignations of three Deans and a purging and reorganization of the National Faculties. Placards of practicing lawyers are allowed to be pasted on the walls of the various clerks' official rooms, by permission of the senior Secretary in charge.

Records of the old Audiencia of Santa Fé de Bogotá, dating from 1549 and including jurisdiction over parts of present Venezuela and Ecuador, are in the Archives in the Capitol and the National Library, and are being gradually sorted and bound, under the charge of two badly paid experts intelligently devoted to their task; eventually there will be some 1,500 dictionary-sized volumes, and when they are suitably indexed a wealth of early Spanish American legal historical material will become available. The leaves and writing are marvellously preserved, with only an occasional mouldy corner. Opening at random a volume whose script was fairly easily decipherable in form, we read, in a case apparently originally about the purchase of a quantity of rice, the deposition of a witness dated 1613, and further along in the same volume, entitled in the same case, we came upon the petition of one of the parties reciting that there had been harmful delay, and asking that a decision be rendered by the honorable Audiencia, the paper being dated 1663. Evidently there were lawyers who knew their business in those days as well as some do now.

Relations with the Holy See are governed by the Concordat of 1887, by which the State obtained practical recognition of its claim to title of all Church properties, but agreed to make certain payments as in lieu of rent for the use of certain large blocks, as the former monastery of San Domingo in Bogotá in which the Post Office and Treasury Departments are established, and further sums annually toward support of the clergy, and to permit the Church to have authoritative selection of all text-books used in the public schools and Colegios, which provisions are still in force and appear to be

working entirely peacefully. Resentment over the action of the United States in connection with the secession of Panama in 1903 is nowhere apparent, since the belated ratification of the adjustment Treaty; and there is probably too deep commitment in northern loans to permit the country to express itself officially in any but a friendly manner for many years to come.

The international problem at the moment is the Leticia controversy with Peru, in which Colombia seems to be very anxious that her position should be deemed by the world a conscientious seeking of settlement by other than warlike means of an issue involving her sovereignty and her honor, in which international law must uphold her as to the respect due a formally completed treaty.

February, 1933.

Washington Letter

1266 National Press Bldg.,
Washington, D. C., March 11, 1933.

THE Seventy-second Congress adjourned March 4, 1933, and all proposed legislation pending on that day failed of enactment. Among the measures which thus failed were: S. 939, to limit the jurisdiction of the District Courts in diversity of citizenship cases; S. 2655, providing for waiver of prosecution by indictment in certain criminal proceedings; S. 3243, limiting the jurisdiction of the District Courts over suits relating to orders of State administrative boards; H. R. 4624, providing for declaratory judgments.

President Roosevelt, by proclamation issued March 5th, called an extra session of Congress which convened on March 9, 1933, and on that day, after receiving a message from the President, both Houses passed the Emergency Banking Relief Bill, (Public No. 1).

The various Senate Committees were organized and the following is the membership of the Judiciary Committee: Henry F. Ashurst of Arizona, Chairman; William H. King of Utah, Hubert D. Stephens of Mississippi, Clarence C. Dill of Washington, Sam G. Bratton of New Mexico, Hugo L. Black of Alabama, M. M. Neely of West Virginia, Huey P. Long of Louisiana, Frederick Van Nuys of Indiana, Patrick McCarran of Nevada, William E. Borah of Idaho, George W. Norris of Nebraska, Arthur R. Robinson of Indiana, Daniel O. Hastings of Delaware, Felix Hebert of Rhode Island, Thomas D. Schall of Minnesota, Warren R. Austin of Vermont.

Rules of Practice and Procedure With Respect to Proceedings in Criminal Cases After Verdict

On February 24, 1933, President Hoover approved Public Law No. 371, to transfer to the Supreme Court of the United States authority to prescribe rules of practice and procedure to be followed by the lower Federal courts in criminal cases after verdict. The act was classed by the Attorney General as "the most important measure directed at the reform of criminal procedure in the Federal Courts that has been enacted for many years." President Hoover, in signing the law, stated that "it should prevent well endowed criminals, who have been convicted by juries, from delaying punishment by years of resort to sharp technicalities of judicial procedure. It will increase the respect for law."

As approved, the measure provides:

That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, and in the Court of Appeals of the District of Columbia.

Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and of preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force

Fees in the Court of Claims

The act making appropriations for the Treasury and Post Office Departments, approved March 3, (Public No. 428) contained the following provision governing the fees to be collected in the prosecution of cases in the U. S. Court of Claims:

The Court of Claims of the United States is authorized and directed, under such rules as it may prescribe, to impose a fee in an amount not in excess of $10 to be fixed by the court for the filing of any petition in any case instituted after the enactment of this act, and for the hearing of any case before the court, a judge, or a commissioner thereof, pending at the time of the enactment of this act.

The court is authorized and directed to charge and collect a fee of 10 cents a folio for preparing and certifying a transcript of the record for the purpose of a writ of certiorari sought by the plaintiff and for furnishing certified copies of judgments or other documents in cases in said court: *Provided*, That not less than $5 shall be charged for each certified copy of findings of fact and opinion of the court to be filed in the Supreme Court of the United States.

The court is also authorized and directed to charge and collect for each certified copy of its findings of fact and opinion a fee of 25 cents for five pages or less, 35 cents for those over five and not more than ten pages, 45 cents for those over ten and not more than twenty pages, and 50 cents for those of more than twenty pages.

On March 7 the Court of Claims promulgated the following order, pursuant to said act:

Pursuant to an act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, approved March 4, 1933, it is hereby ordered that, until the further order of the Court, a fee of $10.00 is fixed for the filing of any petition in any case instituted after the enactment of this act, and for any hearing before the Court, a Judge, or a Commissioner of any case pending in which such fee has not been paid at the time of the filing of the petition, and the Clerk shall require such fees to be paid before the petition is filed or the hearing begun.

It is further ordered that the other fees authorized by the said act shall be charged and collected by the Clerk in accordance with the terms thereof.

Suspension of Rentals on Oil and Gas Leases on Public Lands

On February 9, 1933, the President approved Public No. 330, amending the Leasing Act, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act approved February 25, 1920 (41 Stat. L. 437), entitled

"An Act to promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," be, and the same is hereby, further amended by adding thereto the following section:

"Section 39. In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production of coal, oil, and/or gas under any lease granted under the terms of this Act, any payment of acreage rental prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto: Provided, That nothing in this Act shall be construed as affecting existing leases within the borders of the naval petroleum reserves and naval oil-shale reserves."

On March 3 Secretary Wilbur approved Circular No. 1294 promulgating regulations under the above act.

Impeachment of U. S. District Judge Harold Louderback of the Northern District of California

On February 27 the House of Representatives adopted two resolutions notifying the Senate of its action in voting for impeachment proceedings against Judge Harold Louderback. Five members of the House were appointed to act in the capacity of prosecutors in a trial to be conducted before the Senate sitting as a court. A two-thirds vote would be required for conviction. Articles of impeachment, five in numbers, were printed as Senate Document 215, 72nd Congress, 2nd Session.

On March 9, the Senate, sitting as a court of impeachment, met at 2 o'clock p. m. and the Senators present were sworn as members of the court. A resolution was adopted, notifying the House of Representatives that the Senate was organized for the trial of articles of impeachment and ready to receive the managers on the part of the House at its bar. The Senate then adjourned as a court of impeachment until March 13.

On February 28 H. R. 7121 was approved (Public No. 378—72nd Congress) repealing the following obsolete sections of the Revised Statutes. The figures following the Revised Statute section number in each case give the corresponding reference to the U. S. Code.

R. S. 89, Title 2, sec. 136; R. S. 340, Title 15, sec. 180; R. S. 972, Title 28, sec. 820; R. S. 2458, Title 16, sec. 591; R. S. 2459, Title 16, sec. 592; R. S. 2461, Title 16, sec. 595; R. S. 2462, Title 16, sec. 596; R. S. 2628, Title 19, sec. 41; R. S. 2644, Title 19, sec. 46; R. S. 2645, Title 19, sec. 47; R. S. 2938, Title 19, sec. 378; R. S. 3297, Title 26, sec. 421; R. S. 3911, Title 39, sec. 296; R. S. 3912, Title 39, sec. 297; R. S. 3972, Title 39, sec. 490; R. S. 3973, Title 39, sec. 491; R. S. 3999, Title 39, sec. 521; R. S. 4056, Title 39, sec. 788; R. S. 4316, Title 46, sec. 256; R. S. 4317, Title 46, sec. 257; R. S. 4334, Title 46, sec. 287; R. S. 4340, Title 46, sec. 281; R. S. 4341, Title 46, sec. 282; R. S. 4342, Title 46, sec. 283; R. S. 4343, Title 46, sec. 284; R. S. 4344, Title 46, sec. 285; R. S. 4345, Title 46, sec. 286; R. S. 4371; Title 46, sec. 317.

The law provides that rights or liabilities existing under the foregoing statutes on the date of the enactment of this Act shall not be affected thereby.

Federal Farm Loan Act

On March 4, the President approved Public No. 430, to amend the Federal Farm Loan Act, as amended, to permit loans for additional purposes, to extend the powers of Federal land banks in the making of direct loans, to authorize upon certain terms the reamortization of loans by Federal and joint-stock land banks, and for other purposes.

Interstate Commerce Commission

On February 28, the President approved Public No. 383, to authorize the Interstate Commerce Commission to delegate certain of its powers to an individual commissioner, or to a board composed of an employee or employees of the commission. The act provides that any party affected by any order, decision, or report of any such individual commissioner or board may file a petition for reconsideration or for rehearing by the commission or a division thereof.

Proposed Legislation in 73d Congress

Among other measures, the following have been introduced at the 1st Session of the 73d Congress:

H. R. 7, To limit the jurisdiction of district and circuit courts over suits relating to orders of State administrative boards.

H. R. 53, To limit the jurisdiction of the district courts over suits relating to orders of State administrative boards.

H. R. 9, To provide for the regulation of common carriers by motor vehicle in the same manner as common carriers by railroad.

H. R. 69, To empower judges to grant a limited moratorium in foreclosure proceedings.

Bankruptcy Legislation

On March 3, 1933, President Hoover approved Public No. 420 to further amend the bankruptcy Act, by adding a new Chapter number VIII, entitled "Provisions for the Relief of Debtors." Relief under this act may be granted without adjudication in bankruptcy and without the debtor being declared a "bankrupt."

Section 74 relates to compositions and extensions and applies to individuals, excepting farmers and corporations. The debtor may file a petition (or in an involuntary proceeding before adjudication, an answer) accompanied by schedules, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts, which includes all claims of whatever character, including a claim for future rent. If the petition or answer is approved, there shall be no order of adjudication as in ordinary cases. Provision is made for the appointment of a custodian or receiver, the giving of notices to creditors, the filing of schedules, the examination of the debtor, the nomination of a trustee by the creditors, etc. Application for the confirmation of a composition or an extension proposal may be filed if accepted in writing by a majority in number and a majority in amount of the claims against the debtor.

The Court may, if satisfied that certain conditions have been met, confirm the proposal and thereupon an extension proposal is binding upon the debtor and his unsecured and secured creditors, but it shall not reduce the amount of or impair the lien of any secured creditor, but shall affect only the time and method of its liquidation. Upon confirmation of a composition the consideration shall be distributed as the court shall direct, and the case dismissed. The composition or extension proposal may be set aside for fraud and provision is made for adjudication in bankruptcy for failure of the debtor without sufficient reason to comply with the terms set forth in the confirmation or upon failure of the court to confirm.

The Act gives the court exclusive jurisdiction of the debtor and his property wherever located, upon the filing of the petition or answer, and gives the court the same powers, and provides for the payment of the same fees, as though the petition had been a voluntary petition for adjudication under the bankruptcy act. The court is given power to stay pending suits against the debtors, including suits by secured creditors who may be affected by the extension proposal. The judges of the courts of bankruptcy shall appoint sufficient referees to sit in convenient places to expedite the proceedings under this section of the Act. Involuntary proceedings under this section shall not be taken against a wage earner.

Section 75 relates to Agricultural compositions and extensions and is intended to apply alone to the farmer. The term "farmer" means any individual who is personally bona fide engaged primarily in farming operations or the principal part of whose income is derived from farming operations. Courts of bankruptcy are authorized, upon petition of at least fifteen

farmers within any county, who certify that they intend to file petitions under this section, to appoint for such county one or more referees to be known as conciliation commissioners, with a term of office for one year. Commissioners may be removed by the court if services are no longer needed, or for other cause, and persons engaged in dealing with farmers are not qualified to act as conciliation commissioners. There is also provision for the appointment of a supervising conciliation commissioner, if the court finds it necessary or desirable.

Upon the filing of any petition by a farmer under this section there shall be paid a fee of $10 to be transmitted to the Clerk of the court and covered into the Treasury. Provision is made for fees to conciliation commissioners and supervising commissioners, and the Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but any district court of the United States may, for good cause shown, and in the interests of Justice, permit any such general order to be waived.

Provision is made for the filing within 5 years from the date of the act, of a petition by any farmer showing that he is insolvent or unable to meet his debts and that it is desirable to effect a composition or an extension of time to pay same. He must file an inventory of his estate and the conciliation commissioner shall call the first meeting of creditors and proceed as specified in the act.

Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

These prohibitions do not apply to proceedings for the collection of taxes or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family. Extensions granted pursuant to the act extend the obligation of any person who is secondarily liable for the payment of debts.

Section 77 relates to Reorganization of Railroads engaged in Interstate Commerce, and under its terms any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and desires to effect a plan of reorganization. Petition, together with a filing fee of $100, shall be filed in the court in the territorial jurisdiction where the railroad had its principal executive or operating office during the preceding six months, but in the case of a railroad engaged in interstate commerce but wholly within one state, proceedings shall be brought in the Federal District Court within the state in which the railroad is located. A copy of the petition must be filed with the Interstate Commerce Commission.

Creditors of any railroad corporation having claims or interests aggregating not less than 5 per centum of all the indebtedness as shown by its latest annual report, may, after first having obtained the approval of the Interstate Commerce Commission, file a petition if the railroad company has not done so.

A plan of reorganization shall include (1) a proposal to modify or alter the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them; (3) shall provide adequate means for the execution of the plan, which may, so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act as amended, include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation, and the issuance of securities of either the debtor or any such corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes; and (4) may deal with all or any part of the property of the debtor.

Provision is made for the appointment of a trustee or trustees from a panel selected and designated by the Interstate Commerce Commission, who shall have power to operate the business of the railroad and on authority of the court may issue certificates for cash, property, or other consideration. If a plan for reorganization is not proposed or accepted within a reasonable time or if proposed and accepted but not approved, the proceedings shall be dismissed. The court may refer any matters for consideration and report to special masters designated by the Circuit Court of Appeals.

Before creditors and stockholders are asked finally to accept any plan of reorganization, the Interstate Commerce Commission shall hold a public hearing and thereafter render a report and recommend an equitable plan of reorganization which shall be submitted to the creditors and stockholders for acceptance or rejection. A plan shall not be finally approved by the commission until it has been accepted by creditors holding two-thirds in amount of the claims and by two-thirds of the stockholders of each class. When so accepted, the plan is certified by the commission to the court who may confirm same if satisfied it meets the requirements set forth in the act, after which it becomes binding on the corporation, its creditors and stockholders, and may be carried out subject to the jurisdiction of the Interstate Commerce Commission.

The railroad may file a petition regardless of whether a receiver has heretofore been appointed by a Federal or State Court and the trustee appointed under this act shall be entitled forthwith to possession of its property. The court may stay all other suits against the debtor.

No judge or trustee acting under the Act shall deny or in any way question the right of employees to join labor organizations nor can they interfere with the organization of employees, nor shall they require persons seeking employment to sign any contract or agreement promising to join or to refuse to join a labor organization or if such contract has theretofore been enforced the judge, trustee or receiver shall notify the employees it has been discarded and is no longer binding.

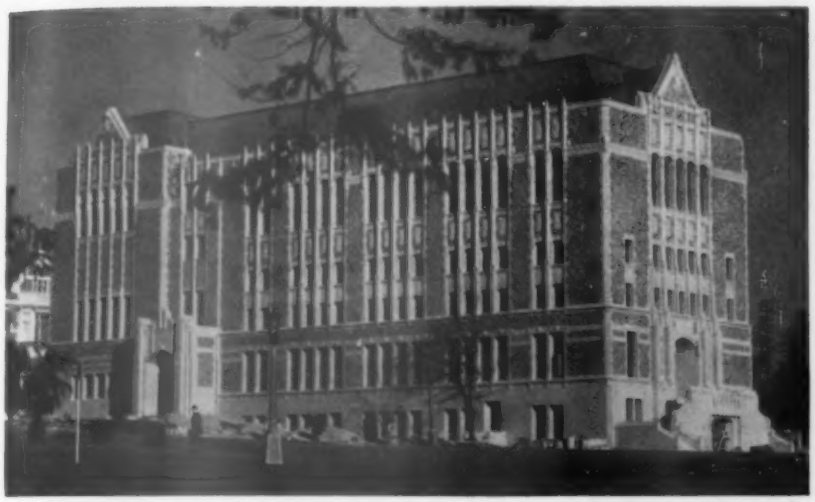
The term "railroad corporation" is defined in the act. Electric railways that do principally a passenger business are not under the Act, while such railways whose business is principally the transportation of freight, are under its jurisdiction. Personal injury claims are given a preferred status. The act became effective on approval.

State Sanctioned Trade Restraints

(*Continued from page* 214)

tenets.[83] But it is also possible to view them as foreshadowing more fundamental changes in the legislative attitude toward the economic system. Perhaps most significant to note, in the entire list of statutes presented, however, is the fact that not one of them protects a consumer interest as such. The legislation noted is enacted without exception for the profit of a production or marketing interest. It is impossible to avoid the conclusion that much of it must have been enacted in purblind subservience to certain politically powerful groups, without a thoroughgoing economic design.

83. Thus the so-called public utilities (power, railroads, etc.) are entirely dissociated from the competitive idea. (But as to whether a state can constitutionally extend this class, see New State Ice Co. v. Liebman, 285 U. S. 262, 52 Sup. Ct. 371 (1932). Banks and insurance companies fall into the same class, as do businesses affected with such public interest that they are publicly regulated. (Mills are a common law example of this class of business. For a recent statutory regulation of the price to be charged for milling, see Virginia Laws of 1932, ch. 421). Patent situations have for centuries been excluded from the rules of competition which surround other businesses of like character (See 1 P. Wms. 183). And such statutes as the Clayton Act evidence a present legislative purpose to exclude labor unions from the operation of the old competitive principles, as well.



University of Washington Dedicates New Law Building

WITH the opening of the winter quarter, the Law School of the University of Washington moved into its new home, John T. Condon Hall, named in honor of the School's first dean and founder.

The new structure completes the liberal arts quadrangle, formed by the buildings housing the departments of home economics, education, commerce, and philosophy, and in design and material is uniform with them. Built of tapestry brick, in the collegiate gothic manner which has been adopted for the newer buildings of the university, trimmed in warm terra cotta, in appearance and arrangement it compares favorably with the most modern educational buildings in the country. The plans were the result of more than two years of study by Dean Harold Shepherd, Dr. Arthur S. Beardsley, librarian, and the architects, A. H. Albertson and associates, of Seattle. Indirect lighting, forced ventilation and heating system, tiled halls and corridors, illuminated black boards, acoustical treatment of all class rooms, an individual lighting system for the reading room tables, and built in desks with chairs of the fixed swivel type in the class rooms combine with superbly planned and executed architectural details to produce a building second to none of comparable size in beauty and utility.

On the first floor are three class rooms of medium size, men's and women's lounges and locker rooms, and the moot court room. Done in panelled oak with a beamed ceiling, the moot court duplicates, on a smaller scale, the superior court rooms in use in the city of Seattle, and is one of the most effective rooms in the building. The men's lounge, 29 by 41 feet, designed to provide a gathering place for informal discussions, is furnished comfortably with davenports, floor lamps, chairs, and reading and writing tables harmonizing with the beamed ceiling and decorative walls.

The second floor, in addition to a large class room with 126 seats arranged in tiers, a seminar room, quarters for the Washington Law Review, and administrative offices, contains in its arrangement of the faculty office group a feature found only in a few of the newest law school buildings in the east. Reached either by means of a private stairway leading to the outside of the building, or through a door from the main corridor, the faculty quarters form a self-contained unit. Twelve pleasant and comfortably furnished offices are provided, six on the second floor and six on a mezzanine floor above; there is a faculty lounge, a faculty meeting room, and adjoining it the faculty library, with stack space for over seven thousand volumes and direct access to the main stacks. A complete working library of reports, state statutes, digests, law reviews, and texts is provided for exclusive faculty use.

From the lobby at the head of the stairs on the third floor, doors to the right lead into the center of the auditorium, two stories high and built after the fashion of an amphitheatre, seating 250; to the left, leaded glass doors give access to the library reading room. One hundred and eight feet long, fifty-four feet wide, with an arched and panelled ceiling, high windows of cathedral glass, and rich woodwork, the room is unsurpassed in beauty. Twenty-two specially built oak tables with sloping tops, equipped with unique individual lamps, will accommodate 250 students at one time. Around the walls, built-in book cases with a capacity of 6,500 volumes contain the working library for the students, and 2,000 more volumes are available in the reserve stacks reached through the delivery desk, which is situated in the center of the back wall. In one corner of the reading room arches lead to the browsing room, fitted with floor lamps and comfortable chairs, and stocked with current legal periodicals, newspapers, special collections, and books for recreational reading of a semi-professional type.

The delivery desk furnishes direct access to the library stack wing, in addition to the librarian's office, work room, cataloguing room, students' typing room, and a room specially located and equipped for the convenience of visiting attorneys who desire to use the facilities of the library. There are five tiers of stacks, with a total capacity of approximately 160,000 volumes, leaving ample room for expansion of the present library of 60,000.

Dedication exercises were held in the auditorium on January 6th, preceded by an open house to which the public was invited. Because of the limited seating capacity, admission to the auditorium was by invitation only, but loud speakers were installed in the reading room and the large class room so that all might hear the addresses. President M. Lyle Spencer of the University presided and made the presentation speech, to which Dean Harold Shepherd responded with an address on

"Legal Education in a Modern State University." Judge George Donworth spoke as representative of the legal profession, and Judge Robert S. Macfarlane for the alumni of the School.

Social Planning and Perspective Through Law

(*Continued from page* 206)

prehensiveness. This is a most grievous fault of the present order.

What is the remedy? We must devise, I believe, an agency empowered to plan social programs —one so situated that it can observe problems in perspective and which is qualified by way of personnel to interrelate the contributions of the various social agencies into a comprehensive and working scheme. If this agency is to be more than another organization, if it is to do more than plan, it must be given a place in the law-making scheme. Mr. Walter F. Dodd, who has had opportunity to observe the operation of the legislative machinery in Illinois, has pointed out that the process of legislation is characterized by a lack of "program," and that the work is "haphazard and purposeless." "There should be," he said, "something in the nature of a permanent organization to prepare a definite program." This organization, he thought, should be "built around the Governor."[30] Recently the National Economic League submitted a question to its Council bearing on a phase of this problem. "Should there be standing legislative counsel," so read the inquiry, "for each legislative house, or other advisory persons appointed by the legislature, to assist in the study of pending legislation as means of improving the technic of law-making and of avoiding uncoordinated and inconsistent legislation?"[31] Eight hundred ten persons consulted answered "Yes," and seventy-five, "No."

A permanent organization appointed by and working with the governor and charged with the duty of planning legislation could become a highly serviceable device. On the other hand it could become just another organization—a passing phase of democracy. Democracy, to be sure, has left in its wake the wreck of many promising schemes. But we must go on ever contriving, experimenting, hoping. An organization of five or seven men chosen on the basis of their fitness for the work could give purpose and consistency to legislation; it could plot and plan legislation; it could drain statutes of multiple and worthless laws; it could look ahead; it could design and construct legal highways over which science and industry, now floundering in a morass of legal impedimenta, could travel; it could rid the highways of a confusion of mystic signs reading "thou shalt not," and mark them with a few well placed guide posts showing the way to destinations.[32]

Such an agency could, in fact, engender a new conception of law. A new conception is essential—an outlook under which law is conceived as a coordinating force and as an agency to plan and execute social programs. This is the only conceivable method through which any system of planning, economic or otherwise, is feasible. If effective planning is to be done, it must be done through law.

Responsibility of the Law Schools

What has been lacking is an appreciation of the capabilities and carrying power of legislation—its possibilities for constructive and comprehensive work, and its strategic position as an integrating and sanctioning force. This conception of the place and function of law should grow, but it is likely to do so only through processes of education. And this task falls squarely on the law schools. For as law holds a strategic position among other agencies for bringing about social improvements, so do the law schools among educational agencies in fitting men for the responsibilities connected with law.

The law schools must shape their programs to fit the changing needs of society. This probably would require that they discard some of the work now given as obsolete and substitute therefor new materials. It might necessitate extending the period of law study by dipping down into the pre-legal period or by lengthening the program with a year at the other end. It might take the direction of initiating programs of specialization. It should introduce into the law schools new faces, new facts and new points of view. But whatever the methods adopted for bringing it about, the schools must seek to prepare students to meet the responsibilities of a new outlook on law. In addition to teaching them the regulative features of the law, the schools must prepare students to think of law in terms of an agency the function of which is to coordinate various factors as they arise in a changing society. This is the assignment given the schools. The world is in the making and this is our part in the program.

30. See President's Message, December 6, 1932.
30. Dodd, *op. cit.*
31. *The Consensus*, October 1932, p. 51.
32. See Gaus, *The Wisconsin Executive Council* (1932) 26 Am. Pol. Sc. Rev. 914.

Commercial Law Reform in Mexico

BY PHANOR J. EDER
Member of the New York Bar

A NEW law went into effect in Mexico on September 15, 1932, on "Negotiable Instruments and Credit Operations" which profoundly modifies the former law on banking, loans, negotiable instruments, warehouse receipts, pledge, trusts, corporate bond issues and kindred matters. A brief summary of a few of its more striking features is deemed of interest.

Negotiable Instruments in General (Title I, Chapter I)

To be entitled to the privileges of negotiable instruments, especially the freedom of a *bona fide* owner from personal defences available to prior parties among themselves, the instrument must specifically bear the respective designations, in the body of the instrument (Art. 14), required by the law, e. g., a bill of exchange must state that it is a bill of exchange (Art. 76), a promissory note that it is a promissory note (Art. 170), a check that it

is a check (Art. 175). The omission of these requisites is made a defence to any action on the instrument (Art. 8).

The Payee is not bound to verify the genuineness of the endorsements nor has he even any right to require proof of such genuineness; his duty is limited to proper identification of the person presenting the bill and to verifying that there is an uninterrupted series of endorsements.

Detailed procedure is provided for the case of lost or stolen, destroyed or mutilated instruments (Arts. 42-68, 73-75). This is necessary in view of the fact that a good title may be acquired to a lost or stolen instrument and it may be enforced against the maker and other parties.

Bills of Exchange (Title I, Chapter II)

The old Continental theory that a bill of exchange presupposes a prior contract of exchange, embodied in the previous law (Art. 449 of the Commercial Code) and imposing many limitations not in accordance with modern banking practices, seems to be abandoned by the new law, and an approximation to our own Anglo-American system is reached; but there are still many important differences.

The requirement that a bill must be an unconditional order to pay a sum certain in money (Art. 76, paragraph 3) is extended to declare as void and not written any provision for interest or penalty (Art. 78). A bill may now be drawn to the order of the drawer himself, and may be drawn on the drawer payable at a different place (Art. 82); but may not be drawn to bearer (Art. 88). The new law, in contrast to the old, makes provision for documentary drafts, and the form of acceptance is simplified.

The rules as to waiver of protest are favorably changed, but unfortunately not the complicated formalities for protest.

Another useful innovation in the law, in conformity with our own, is the right now given the holder to sue one or more parties liable on the instrument, without losing his right of action against the others (Art. 154). Parties secondarily liable, however, must be sued within three months of protest, or, if protest has been waived, of presentation; otherwise the right to bring the special "exchange" action lapses (Arts. 151, 160); and rights of parties taking up the bill may similarly lapse (Art. 161).

Checks (Title I, Chapter IV)

Checks may be drawn only on a banking institution (Art. 175).

The intent of the legislator to encourage the use of checks by giving them greater credit and circulation is evidenced in many provisions, some of which, however, revolutionize banking practices and may entail hardship and therefore may tend to restrict rather than to expand the use of checks as a substitute for currency.

A check is now in legal effect an assignment of so much of the funds of the drawer in the bank as are represented by the face value of the check. The drawer cannot stop payment on his check under any circumstances, even for fraud or duress, at least not until after the lapse of the period prescribed for the due presentation of checks.

The death or subsequent incapacity of the drawer does not act to stop payment (Art. 187). If in funds, the bank is in all cases absolutely bound to make payment of a check, under penalty of all damages to the drawer, which in no event are to be less than 20 per cent of the face value of the check (Art. 184). On the other hand, the banker paying on a forged or raised check is usually protected. Certification of checks and traveler's checks are also expressly provided for (Art. 199; Arts. 202, seq.).

Conflict of Laws (Title I, Chapter VII)

This is treated in considerable detail (Arts. 252-258). Capacity, and conditions essential to validity of an instrument issued abroad, are governed by the law of the country where it is issued; but instruments payable in Mexico are valid if the requirements of Mexican law are complied with. Obligations and rights arising out of an instrument issued abroad are governed by the law of the place of issuance, if not contrary to Mexican public policy. Presentment, payment and protest are governed by the law of the place for performance of such acts. An instrument, though issued abroad, but sued on in Mexico, is subject to the Mexican statute of limitations.

Credit Operations in General (Title II)

An innovation, to bring the law up to date with commercial practice, is introduced in Chapter III which authorizes discounting book accounts. There was no previous authority in Mexican statutory law for this transaction which, however, is expressly limited to banking institutions (Art. 290).

The provisions of Section 1 of Chapter IV on opening credits are in general in harmony with modern banking practice. The previous Code contained no express legislation on this subject. Section 2 on "accounts current" also fills a lacuna of the previous Code. Section 3 on (revocable) "letters of credit" is very brief, does not substantially alter the prior law (Commercial Code, Arts. 564-575), and leaves unsolved knotty legal questions as to letters of credit. Provision is made, however, by Section 4 (Arts. 317-320) for *confirmed credits* which were not dealt with at all in the old law.

Section 5 deals with loans and advances for industrial and agricultural purposes, of materialmen, and for wages and other operating expenses, and the liens given therefor. These provisions are comparatively new in the mercantile law of Mexico. In effect, a chattel mortgage, hitherto legally difficult, except under certain special laws, is now permitted.

Trusts (Title II, Chapter V)

It is well known that our Anglo-American institution of Trusts was until very recently not in existence in Civil Law countries.

The Mexican banking law of 1926 authorized the creation of trusts but only in cases where a Mexican trust company or a Mexican banking institution with an authorized trust department was the trustee. This limitation is also embodied in Art. 350 of the new law. Its striking feature is its

adoption of the basic principle of our trust, and its incorporation in the general legal system. A trust may be created, by acts *inter vivos* or by will, over property and rights of every kind, save those that are strictly personal, and for any lawful and specified purposes (Arts. 351, 352, 346). Of course, due steps, e. g., recording in the case of realty, must be taken to effectively transfer the legal title to the Trustee (Arts. 352, 353, 354). Secret trusts are prohibited, as are also (a) trusts in favor of successive beneficiaries not living or conceived at the time of the death of the grantor, and (b) trusts for a term of more than thirty years for the benefit of juristic persons (e. g., corporations) other than governmental bodies (*de orden público*) or charitable institutions (Art. 359).

The incorporation and development of the idea of the trust in Mexican law, first broached in the Banking Law of 1926, is perhaps the most noteworthy and valuable feature of the new law; it could undoubtedly facilitate business in that country, especially for Americans and Britishers to whom the daily use of the trust seems indispensable, provided the courts construe the law liberally and in accordance with the progressive intent of the legislature.

Much other new legislation, of vital importance, has recently become law in Mexico. In addition to the new Banking Law enacted in June, 1932, a new Civil Code, passed in 1928, went into effect on October 1, 1932, and a new Code of Civil Procedure also went into force on the same date.[1]

1. Acknowledgment is gratefully made to Perry Allen, Esq., of Mexico City, for material used in the preparation of this article.

The Mixed Claims Commission Decision in the "Black Tom" and "Kingsland" Cases

By AMOS J. PEASLEE
Member of the New York Bar

ON December 3, 1932, the Mixed Claims Commission, United States and Germany, in an opinion written by Mr. Justice Roberts sitting as Umpire, rendered upon a certificate of disagreement by the National Commissioners, dismissed a petition of the American Agent for a rehearing of the "Black Tom" and "Kingsland" sabotage claims against Germany. Thus was concluded a second chapter in the claims of the United States against Germany for damages for acts of sabotage committed in the United States by German agents while the United States and Germany were at peace. An earlier chapter in this dramatic litigation terminated with a prior decision of the Commission rendered after an extensive argument in the Peace Palace at The Hague in September, 1930.

The questions presented upon the petition for a rehearing of the "Black Tom" and "Kingsland" claims were principally questions of fact. The controversy as to whether German Government officials did authorize the spread of fire and disease germs in the United States while we were at peace with Germany has raged ever since charges to that effect were made in the public press during the neutrality period. The Commission has unanimously found Germany guilty of the authorization of such acts and of the support by money and sabotage equipment of persons empowered to carry out such an official policy. The unanimous opinion of the Commission rendered at The Hague on October 16, 1930, says, with regard to authority to conduct sabotage:

"We have no doubt that authority was so given by Marguerre in February, 1916. Marguerre himself so testifies. Nadolny had on January 26, 1915, sent a cable authorizing such sabotage. Nadolny in his evidence gives the impression that the policy was abandoned shortly after his cable. Marguere testifies that the authority given by him in 1916 was not to be exercised during neutrality, but only in case the United States entered into the war. We do not believe his evidence with respect to this alleged limitation of the authority, though."

Witnesses called by Germany as well as witnesses called by the United States, testified that they did carry on a campaign of such destructions. The Commission has held, however, upon the evidence before it, that it is not convinced that Germany accomplished the specific destruction of the Black Tom and Kingsland properties.

The "Black Tom" properties consisted of the railway terminal of the Lehigh Valley Railroad Company in New York Harbor and extensive stores of supplies destined for the Allies but owned by American citizens, which were blown up on the night of July 30, 1916. The "Kingsland" properties were composed principally of the large assembling plant at Kingsland, New Jersey, where the orders of the Russian Government which were being filled by many subcontractors throughout the United States were being assembled for packing and shipping at Kingsland, New Jersey. Those properties were destroyed on January 11, 1917. The two destructions resulted in losses of about $30,000,000.

During the course of the two trials which has extended over a period of about five years, the American Agent, Hon. Robert W. Bonynge, made requests and motions on the part of the United States to permit the issuance of subpoenas by the Commission under the terms of the Act of Congress of July 3, 1930 (46 Stat. 1005), entitled "An Act authorizing commissioners or members of international tribunals to administer oaths, to subpoena witnesses and records and to punish for contempt." All of those efforts were opposed by Germany, upon the ground that the Act was passed after the agreement had been made between the two governments and hence was inapplicable to proceedings before this Commission. Diplomatic negotiations were also instituted by the Secretary of State of the United States endeavoring to procure an amendment to the agreement between the two governments to permit the issuance of subpoenas but those efforts were unsuccessful, being opposed by Germany.

The result of all of this was the United States was unable to subpoena a number of witnesses residing in the United States whose names were prominently connected by the evidence with the German sabotage campaign and who undoubtedly have extensive knowledge concerning it. Germany, on the other hand, was able through a statute of Germany to call witnesses before the German Courts and compel their testimony. The Umpire in rendering the 2 to 1 decision of the Commission

held that he was obliged to decide solely on the basis of the evidence in the record and that on that basis he was not satisfied that the United States had sustained the burden of proof in these particular cases regardless, as he said, of "whatever may be the belief of any member of the Commission with respect to Germany's general attitude and the motives or purposes of its agents, or with respect to the equities of the claimants."

There are still a few additional sabotage claims which were filed with the American Agent before the time limit for filing claims expired under existing agreements on July 1, 1928. There are also other claimants who have filed claims since that date and who are seeking authority to have their claims heard upon the ground that the facts establishing Germany's breach of neutrality were not proved until after the date had expired for filing claims. Some measures are pending before Congress which may have the effect of permitting witnesses to be subpoenaed and which may elicit facts which may yet enable the United States to have the Black Tom and Kingsland claims reopened. It lies within the legal power of Germany to refuse an extension of time for filing claims before the Commission and to continue her refusal to permit the subpoenaing of witnesses and records, but it lies within the power of the United States to decline to consent to the conclusion of the Mixed Claims Commission's work and to decline to release the security given by Germany for awards of the Commission until this subject has received satisfactory attention.

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Arizona

Arizona Bar Association Urges Legislature to Enact Bar Incorporation Bill—President Crump of California State Bar Speaks on Benefit of Integrated Bar

The annual meeting of the Arizona Bar Association was held at Phoenix on Saturday the 28th day of January, 1933, and was well attended.

The principal matter coming before the meeting was the Bill for the incorporation of the Bar which was introduced in both houses of the Legislature immediately upon the convening of that body. Two amendments to the measure as written were adopted and the Bill as so amended was unanimously approved by the meeting and the Legislature requested to enact it.

Hon. Guy R. Crump, President of the California Bar, was the guest of the meeting and addressed it at the afternoon session on the benefits of the integrated bar. His address was illuminating and had the fortunate result of converting several members of the Legislature who were present for the purpose of hearing his address.

Mr. Geo. W. Nillsen of Los Angeles, a member of the Arizona Bar, addressed the meeting on the subject of "The Lawyer and the Constitution."

The annual Banquet was held at the Arizona Club, the after-dinner speakers being Hon. Guy R. Crump and Mr. P. W. O'Sullivan of Prescott.

The officers for the ensuing year are: Hon. Richard Lamson, Judge of the Superior Court in and for Yavapai County, Prescott, President; James E. Nelson, Phoenix, Secretary and Treasurer; Executive Committee: P. W. O'Sullivan, Frank Flynn and John Francis Conner, all of Prescott.

JAMES E. NELSON, Secretary.

M. B. POPE
President Utah State Bar

Utah

Utah Bar Approves Model Code of Criminal Procedure—Annual Meeting Well Attended—Recommendations of Judicial Council Section for Legislation Adopted

Members of the Utah State Bar from all sections of the State gathered at the Hotel Utah, Salt Lake City, on Saturday, January 21, for the Second Annual Meeting of the integrated Bar. The attendance, though slightly smaller than that of the First Annual Meeting, held January 9, 1932, was very gratifying. There were 342 lawyers and 26 students of the University of Utah law school in attendance at the meetings.

President William M. McCrea called the meeting to order at 10:00 A. M. R. B. Porter, President of the Salt Lake City and County Bar Association, delivered an address of welcome which was followed by announcements and the Report of the Secretary. President McCrea then gave the annual address of the President in which the activities of the past year were reviewed. This was followed by reports of various committees.

At the beginning of the afternoon session E. A. Rogers presented a memorial resolution of the departed members of the Bar who had died during the past year, and it was moved that this resolution be printed in the next volume of Utah Reports.

The remainder of the afternoon session was given over to reports of the various luncheon sections and discussion, adoption, modification or rejection of the reports and resolutions there adopted.

It was reported by R. A. McBroom that there was no discussion and no complaints in regard to Trust Company Relations. E. A. Rogers reported on the

matter of Unlawful Practice of the law by Real Estate men and others.

Carl Badger reported that the committee on Criminal Procedure adopted three resolutions: (1) That a letter of appreciation be sent to the State Department of Criminal Identification for the excellent work done; (2) That an appropriation be sought to provide for collection and compilation of statistics on criminal prosecution in the state; and (3) That the report of the committee on the Code of Criminal Procedure be adopted.

Adoption of the report of this committee, which was carried, means the State Bar's approval of the Model Code of Criminal Procedure of the American Law Institute.

Dean F. Brayton presented the report of the Judiciary Committee for a non-partisan judiciary as published in the Bulletin with Judicial Council Report, which after a lengthy discussion and considerable dissent was adopted with some minor amendments proposed by the luncheon section. The final vote for adoption was 108 to 63.

The report of the Judicial Council Section was presented by A. B. Irvine and the following recommendations were adopted:

(1) That two University of Utah law school graduates be selected to canvass the State and make a statistical study to aid the committee in further study of the matter of realignment of judicial districts.

(2) That legislation be passed providing for all criminal prosecution under direction of the district attorney.

(3) That the present laws be amended to extend the jurisdiction of the justices of the peace in criminal actions to cover all offenses committed in the county in which the justices reside, or that in all cases where a change of venue is granted, the justices to whom cases are transferred shall be given jurisdiction to try them.

(4) A constitutional amendment permitting legislation to limit the number of a jury in the district court to four jurors in all controversies where the amount involved does not exceed a sum to be fixed by the legislature and in all misdemeanor cases.

(5) An increased appropriation for the Supreme Court to enable each Justice to hire a law clerk.

(6) Necessary legislation to provide for one panel of jurors only in counties that have but one district judge.

The matters of the juvenile courts and of the industrial commission were tabled in order that they might be given further study during the coming year, before any recommendations should be approved by the Bar.

Members of the Bar and their ladies attended the annual banquet held in the evening at the Hotel Utah. There were 442 in attendance. Retiring President McCrea introduced the toastmaster, Burton W. Musser. Arthur Woolley of Ogden gave an address which was broadcast over KDYL radio station. His subject was the relation of the lawyer to the public.

W. W. Ray gave a very interesting talk on the early history of the Bar in Utah, built around the lives of some of the men whose great abilities and color made it illustrious.

Musical numbers were given by Virginia Freeze Barker, vocalist; Reginald Beales, violinist, and William Peterson, pianist.

The Bar Integration Movement

The Conference of Bar Association Delegates has undertaken to present under the above heading as much news as possible concerning bar integration. It is hoped that officers of state bars and all others interested in this subject, especially chairmen of bar committees to which are entrusted the drafting of bar acts, will keep the Conference informed as to progress. Information may be sent to Secretary Herbert Harley, Ann Arbor, Mich. While interest centers at present in the efforts of a number of Bar Associations to obtain legislative approval of bar organization bills, the problems met and progress made in all states having inclusive bar membership will be equally pertinent.

With a vote of more than two to one the South Dakota senate defeated a bill which would have repealed the State Bar act adopted two years ago. In Oklahoma the State Bar also has a fight on its hands to prevent repeal of its fundamental act.

The Arizona State Bar Association's organization bill, which was passed two years ago, but vetoed, was enacted this year, and the members of the Association are "feeling good" about it and looking forward with confidence to its successful operation. The measure is the same as the bill introduced in two previous legislatures. The approval of the Governor is apparently regarded as certain.

The Washington State Bar Association won a signal victory with its bar integration bill. The vote in the Senate was nearly unanimous, being 33 to 5. The bill was altered only by providing specifically that the members of the board of governors should be elected by a "secret ballot by mail." The act is original in form with but seventeen sections, but confers the traditional powers.

Copies of the pamphlet entitled "State Bar Acts Annotated," which was published about two years ago by the Conference of Delegates, are available to all interested persons. Apply to the American Bar Association's secretariat, or to the secretary of the Conference. The acts in force in eight states, with amendments to and including 1931, as well as model acts, are published in this pamphlet.

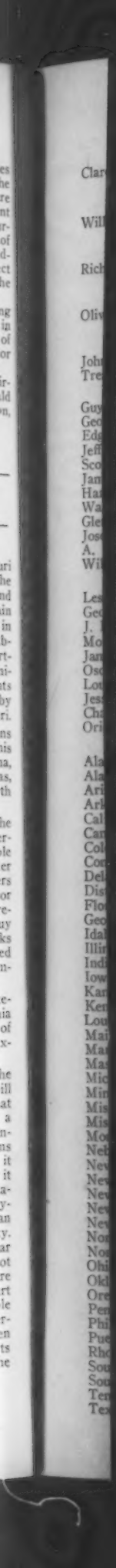
The February number of the Missouri Bar Journal contains citations of all the decisions affecting state bar acts, and also comment on decisions which sustain their validity. This journal illustrates in every number the great value of establishing a state bar journal before starting the campaign for statutory organization. The February number presents in full favorable editorials published by the three leading newspapers of Missouri.

The states in which Bar Associations have had integration bills introduced this year are: Washington, Oregon, Arizona, Montana, Wyoming, Kansas, Texas, Iowa, Michigan, Indiana, and North Carolina.

A bill was introduced recently in the California legislature to permit all persons who have received an honorable discharge from the army or navy after service in time of war to become lawyers on motion. Residence in the state for one year is required, but educational requirements are waived. President Guy Crump of the California State Bar asks "why the legal profession was singled out as an avenue of escape from unemployment."

The source of opposition to bar integration is revealed in another California bill, which would impose a limitation of one year on disciplinary proceedings, except when fraud is charged.

In North Carolina the feature of the State Bar Association organization bill which has been most criticized is that which makes it a misdemeanor for a person to practice law who is not entitled to practice. If limited to persons who have never qualified under law it might appear appropriate, but when it includes practitioners temporarily incapacitated to practice because of non-payment of fees or under suspension by an order of court it is of doubtful propriety. This section appears in nearly all bar acts and it seems strange that it has not been under discussion before. It is here suggested that the power of the court to restrain unauthorized practice is ample and there is a lack of dignity in mustering the criminal law. There have been many instances of control by the courts but apparently none of resort to the police.



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